Supreme Court, U.S.
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No. 01 -

IN THE
Supreme Court of the United States

ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

MCKESSON HBOC, INC., et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Thomas G. Corcoran, Jr.
Counsel of Record
Mary-Ellen Noone
Berliner, Corcoran & Rowe, LLP
Suite 1100
1101 17th Street, N.W.
Washington, D.C. 20036
(202) 293-5555
Attorneys for Petitioner

Bruno A. Ristau
4500 Foxhall Crescents, N.W.
Washington, D.C. 20007
Of Counsel

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QUESTIONS PRESENTED

The district court entered judgment against the state of Iran in favor of a United States investor for the expropriation of its minority shareholder interest in an Iranian dairy company. Although reversing in part, the court of appeals affirmed the district court's rulings, (1), that it had subject matter jurisdiction pursuant to the direct effect clause of the Foreign Sovereign Immunities Act, and, (2), that the United States investor had a private right of action under the Treaty of Amity between the United States and Iran.

The questions presented are:

1. Whether the Treaty of Amity between the United States and Iran creates a private right of action for the United States investor against Iran in the courts of the United States.

2. Whether the direct effect clause conferred jurisdiction over the dairy company's non-payment of dividends in Iran – even if that non-payment itself did not cause a direct effect in the United States – because related commercial activity did cause a direct effect in the United States.

3. Whether, if the related commercial activity could not provide the jurisdictional link for the non-payment of dividends, the direct effect clause conferred jurisdiction over the non-payment of dividends, where it was conceded that the dividends were payable only in Iran.

4. Whether Iran was entitled to summary judgment (A), for failure to prove jurisdictional facts, where the gravamen of the case was just the non-payment of dividends, and (B), on the merits, where Iran's uncontradicted affidavits and legal opinions established that the investor had not been unlawfully deprived of its dividends under non-discriminatory Iranian law.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

1. The Islamic Republic of Iran ("Iran"), a foreign state, petitioner.

2. The Overseas Private Investment Corporation ("OPIC"), an instrumentality of the United States Government, and McKesson HBOC, Inc., and its wholly-owned subsidiaries, Foremost Tehran, Inc., Foremost Shir, Inc., and Foremost Foods, Inc. ("McKesson"), domestic United States corporations, respondents. Respondents are sometimes collectively referred to as "McKesson" consistent with the practice of the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Islamic Republic of Iran respectfully petitions the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on November 16, 2001.

OPINIONS BELOW

The opinion of the court of appeals is reported at 271 F. 3d 1101 and reproduced at Appendix A. The order denying Iran's petition for rehearing en banc is reproduced at Appendix B. The order on Iran's petition for rehearing is reproduced at Appendix C. The judgment of the court of appeals is reproduced at Appendix D. The opinion of the United States District Court for the District of Columbia valuing McKesson's interest in Pak Dairy is unreported and is reproduced at Appendix E. The judgment of the United States District Court for the District of Columbia in the amount of $20,071,159.14 is reproduced at Appendix F. The opinion of the United States District Court for the District of Columbia granting McKesson's motion for partial summary judgment on liability is unreported and is reproduced at Appendix G. Two earlier opinions of the court of appeals are reported at 905 F.2d 438 and 52 F.3d 346 and are reproduced at Appendix H and I, respectively. Finally, an award of the Iran-United States Claims Tribunal is reported at 10 Iran-U.S. Cl. Trib. Rep. 228 (1986), and may also be reviewed in the Joint Appendix ("JA") submitted to the court of appeals at pp. 171-212.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2001. App. A, 1a. Iran's timely petition for rehearing en banc, as well as McKesson's timely petitions for rehearing and rehearing en banc were all denied on January 11, 2002. App. B. Iran's timely petition for rehearing also was denied, in effect, on January 11, 2002. App. C. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION AND INTERNATIONAL AGREEMENT INVOLVED

The statutory provision involved is 28 U.S.C. §1605(a)(2), part of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§1330 and 1602-1611. It reads:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case — ...
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state ["Clause 1"]; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere ["Clause 2"]; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States ["Clause 3"]. [Clause numbers added.]

This case was brought under Clause 3, the "direct effect" clause.

The relevant provisions of the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, signed at Tehran August 15, 1955, and entered into force June 16, 1957, TIAS 3853, 8 U.S.T. 899, (hereafter "Treaty of Amity" or "Treaty") are as follows:

> Article III.2. Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of

such other High Contracting Party or of any third country. It is understood that companies not engaged in activities within the country shall enjoy the right of such access without any requirement of registration or domestication.

Article IV.2. Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

Article XXI.1 Each High Contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other High Contracting Party may make with respect to any matter affecting the operation of the present Treaty.

Article XXI.2 Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

STATEMENT OF THE CASE

In 1982, OPIC and McKesson (collectively sometimes "McKesson") brought suit under the FSIA against Iran and five of its alleged instrumentalities for the taking of McKesson's equity interest in the fifth instrumentality, Pak Dairy, an Iranian corporation. The other four instrumentalities were alleged to own a majority of Pak Dairy's stock. OPIC and McKesson claimed that McKesson's interest in the dairy company was expropriated by its board of directors at the instigation of four shareholding instrumentalities that, in turn, were acting under the direction of Iran. OPIC, an agency of the United States that insures private overseas investments of United States nationals, had insured 64% of McKesson's investment in Pak Dairy.

The suit was stayed pursuant to Executive Order 12294,[1] while the identical claim was presented to the Iran-United States Claims Tribunal ("Tribunal").

In 1986, the Tribunal awarded McKesson compensation for unpaid dividends declared by Pak Dairy in 1979 and 1980, and for breaches of certain contractual undertakings, but concluded that as of its jurisdictional cut-off date of January 19, 1981, the interference with McKesson's shareholder's rights had not amounted to an expropriation. Foremost v. Government of Iran, 10 Iran-U.S. Cl.Tr.R. at 250; JA:193 . One of the reasons why the Tribunal concluded that McKesson's equity interest had not been taken, as of January, 1981, was that, later in 1981, Pak Dairy offered to pay the outstanding dividends. Id. at 247; JA:190.

In 1988, McKesson revived its district court suit by filing a motion for partial summary judgment on liability for expropriation. Iran countered with a motion to dismiss for lack of subject-matter jurisdiction, which the court denied.

On Iran's first appeal, the court below ruled that the

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[1] 46 F.R. 14111, dated February 26, 1981; see, Dames & Moore v. Regan, 453 U.S. 654, 684-685 (1981).

effects in the United States alleged by OPIC and McKesson – the "freezing out" of the "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging between the United States and Iran to support Pak Dairy" -- were sufficiently "foreseeable, substantial and direct" to survive Iran's motion to dismiss. Foremost-McKesson et al. v. Islamic Republic of Iran, 905 F.2d 438, 441 (D.C.Cir. 1990) (" McKesson I"); App. H, 151a. The case was remanded for jurisdictional discovery and findings on Iran's claimed control over Pak Dairy. App. H, 157a.

While the parties were engaged in jurisdictional discovery, this Court decided Republic of Argentina v. Weltover, 504 U.S. 607 (1992). The Court rejected the "substantial and foreseeable" interpretation of the direct effect clause that McKesson I had followed, and adopted the "immediate consequence" test. 504 U.S. at 618. The Court concluded that such an immediate consequence in the United States had been established in that case because Argentina had breached its obligation to Weltover to make payment in New York. Id.

Following the conclusion of the jurisdictional discovery, Iran renewed its motion to dismiss for lack of subject-matter jurisdiction based on the Weltover Court's interpretation of the direct effect clause because Pak Dairy had no contractual duty to make any payments in the United States. Although the district court did not specifically reject Iran's argument, it concluded that there was a direct effect here because "[a]s a direct, and immediate, consequence of Iran's allegedly wrongful acts, there was a discontinuance of dividends, a stoppage of shareholder communications, and a cessation in the transfer of machinery and other supplies between the two countries, the impact of which was felt in the United States." 1993 U.S. Dist. LEXIS 11792, p. 19 (D.D.C. 1993). The district court further found that Iran exerted sufficient control over Pak Dairy's Board of Directors to justify attributing the alleged expropriatory acts of that board to Iran. Id. at pp. 12-15.

On Iran's second appeal, the court below also rejected

Iran's direct effect argument, reasoning that although Weltover had rendered superfluous McKesson I's discussion of why the effects were "foreseeable" and "substantial," it had not undermined the Court's separate analysis that the effects were also "direct." McKesson Corporation et al. v. Islamic Republic of Iran, 52 F.3d 346, 350-351 (D.C.Cir. 1995)("McKesson II"); App. I, 168a. The court concluded that "(b)ecause this portion of our prior opinion is unaffected by Weltover, it remains the law of the case, not subject to reconsideration in this second interlocutory appeal." Id.

This Court denied Iran's petition for certiorari. 516 U.S. 1045 (1996).

On remand to the district court, McKesson renewed its motion for partial summary judgment on liability for expropriation, and Iran cross-moved for summary judgment. Iran also opposed McKesson's motion, on the alternative ground that genuine issues of material fact existed both as to jurisdiction and expropriation, and requested discovery.

McKesson's position was that the Tribunal had found that the question whether McKesson's interest had been expropriated was "finely balanced" as of the Tribunal's jurisdictional cut-off date, January 19, 1981, at which time McKesson had not received two annual dividend payments. The Tribunal awarded McKesson the dividends due in 1979 and 1980. Since McKesson received no further dividends thereafter, at some point its interest was expropriated.

McKesson argued that either the Treaty of Amity or customary international law provided it with a cause of action in a U.S. court.

Iran's position was that, as the Tribunal had found, Pak Dairy had credited McKesson's dividends to it on Pak's books and offered, in the Fall of 1981, to pay the outstanding dividends. McKesson did not receive its dividends in 1981 and thereafter only because it had decided not to claim them as required by Iranian law in order to sustain a claim for expropriation before the Tribunal. A representative of

McKesson had not "come to the company" at the time set by the board of directors to collect the dividends.

Iran also argued that the acts upon which McKesson's cause of action was based, essentially just the denial of dividends, had no direct effect here because there was no obligation to pay here with respect to any actionable act alleged. In any event, neither the Treaty of Amity nor customary international law provided McKesson with a cause of action in a U.S. court.

In the alternative, Iran argued that McKesson's motion for partial summary judgment should be denied because Iran, in a statement of genuine issues, had set forth specific facts showing that there were genuine issues for trial, not only as to whether an expropriation had taken place, but also as to jurisdiction, that is, whether the acts upon which plaintiffs relied as causing a direct effect had occurred, or whether Iran had participated in them, or whether, if it had, its participation was "commercial" within the meaning of the FSIA.

The district court granted McKesson's motion and denied Iran's. The court ruled that McKesson had a cause of action under either the Treaty of Amity or customary international law. App. G, 116a. It found that a "more or less irreversible deprivation" of McKesson's "shareholding rights" "constituting an expropriation" in full occurred as of April, 1982. The principal reason was that, as of that time, McKesson had been denied four annual dividend payments. App. G, 115a. The court rejected Iran's evidence that the "come to the company" requirement was a legal requirement and ruled that compliance with the requirement would have been "futile." App. G, 112a.[2]

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[2] Iran filed two motions attempting to reverse that decision, based on additional legal opinions and affidavits on Iranian law and practice that addressed the court's "come to the company" and "futility" rulings. Iran also filed a motion to dismiss based on a treaty between the U.S. and Iran providing for the arbitration of investment disputes, and specifically offered to arbitrate the case. Finally, Iran filed a motion for reconsideration based on newly discovered evidence showing that Pak

The damages part of the case was tried between January 18 and February 17, 2000.[3] On May 26, 2000, the court entered a judgment against Iran in the amount of $20,071,159.41, including simple interest from April 5, 1982. App. F, 86a-87a.

Iran again appealed.

The court below agreed that McKesson's motion for partial summary judgment should not have been granted with respect to two issues, viz., whether Pak Dairy's board had adopted the "come to the company" requirement, and whether compliance with it would have been "futile." McKesson HBOC, Inc., et al. v. Islamic Republic of Iran, 271 F.3d 1101, 1108-1110 (D.C.Cir. 2001)("McKesson III"); App. A, 14a-15a

The court, however, rejected Iran's argument that none of the actionable acts upon which plaintiffs relied, in particular, the non-payment of dividends, had caused a direct effect in the United States. It held that Iran's reliance on Kingdom of Saudi Arabia v. Nelson, 507 U.S. 349 (1993), was misplaced because "Nelson held only that commercial-activity jurisdiction cannot exist absent some nexus between the elements of the cause of action and the commercial activity that forms the basis for jurisdiction. 507 U.S. at 357-58." See footnote 4, infra. In contrast, in this case, Pak Dairy had cut off all commercial ties with McKesson in Tehran, and that fact, together with the nonpayment of dividends, established a sufficient nexus with the United States to justify the exercise of commercial activity jurisdiction under the FSIA. McKesson III at 1106; App. A, 7a-8a.

The court of appeals also rejected Iran's Treaty of

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had attempted to continue its commercial relations with McKesson but McKesson had cut-off those relations in 1981 to bolster its claim for compensation with OPIC. The court denied all of these motions. JA:46, 52, 59-60, 66.

[3] During the trial, the court entered default judgments against the other defendants named in the Amended Complaint, none of which had appeared.

Amity argument, that Article IV, Clause 2 of the Treaty only conferred a right of action on an Iranian citizen in a U.S. court. Because one of the purposes of the Treaty was to protect property of U.S. nationals, and because the Treaty "doesn't say that those protections can only be enforced in the territory of the other party," the Treaty provided a U.S. investor with a cause of action in a U.S. court against Iran. McKesson III at 1107-1108; App. A, 10a-11a.

Iran's petition for rehearing on the direct effect issue was denied, but the court redrafted the paragraph of its opinion in which it discussed the Nelson case. Instead of characterizing Nelson as requiring only "some nexus between the elements of the cause of action and the commercial activity that forms the basis for jurisdiction," the court characterized Nelson as holding that "commercial-activity jurisdiction cannot exist unless the commercial activity that forms the basis for jurisdiction also serves as the predicate for plaintiffs' cause of action." As before, other commercial acts provided the required "nexus." McKesson III at 1106; App. A, 7a-8a.[4]

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS ERRED WHEN IT RULED THAT THE TREATY OF AMITY WITH IRAN CREATES A PRIVATE RIGHT OF ACTION FOR AN AMERICAN CORPORATION TO RECOVER COMPENSATION FROM IRAN FOR A TAKING OF ITS PROPERTY IN IRAN.

It is established law that treaties do not as a general rule create private rights that are enforceable by U.S. courts against

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[4] The language that was amended first read in full: "In our view, neither argument has merit. Nelson held only that commercial-activity jurisdiction cannot exist absent some nexus between the elements of the cause of action and the commercial activity that forms the basis for jurisdiction." After amendment the language reads in full: "In our view, the first argument has no merit, thus rendering the second irrelevant. Nelson held that commercial-activity jurisdiction cannot exist unless the commercial activity that forms the basis for jurisdiction also serves as the predicate for the plaintiff's substantive cause of action." App. A, 7a-8a.

the foreign treaty partner. Head Money Cases, 112 U.S. 580, 598 (1884).[5]

Even a treaty stipulation that compensation shall be paid to nationals of the other treaty partner for acts that violate the treaty does not create a private right of action. The governing principle was set forth in Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989), where Amerada sued for damages caused to its vessel on the high seas by an Argentine military aircraft. Amerada contended that two conventions, each of which, like the Treaty of Amity, imposed a treaty obligation on member states to pay compensation for certain wrongs, provided a private remedy against Argentina in U.S. courts. This Court rejected the contention, stating:

> These conventions, however, only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts. Cf. Head Money Cases, [supra at] 598 ; Foster v. Neilson, 2 Pet. 253, 314 (1829). [Footnote omitted]

488 U.S. at 442.

The rule that general language in a treaty does not create a private right of action enforceable in our courts has also been

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[5] The Circuit Courts have uniformly applied this principle. See, e.g., United States v. Li, 206 F.3d 56, 60-61 (1st Cir. 2000) (en banc)(treaties do not generally create rights that are privately enforceable in U.S. courts); United States ex rel. Saroop v. Garcia, 109 F.3d 165, 167 (3rd Cir. 1997)(no private right of action absent "express provision" in treaty); Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992)(treaties "not presumed" to create private rights of action); Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 937-938 (D.C.Cir. 1988)(private rights created only if "the intent of the signatory parties is manifested by the language of the instrument").

acknowledged on many occasions by the United States.[6]

Interpreting the Treaty of Amity with Iran, the court below ruled that it provided McKesson with a private cause of action in a U.S. court because it explicitly creates property rights for foreign nationals in Article IV, Clause 2, and contemplates judicial enforcement of those rights in Article IV, Clause 1. Rejecting Iran's argument that the Treaty only confers a right of action on an Iranian national in a U.S. court, the court noted that the Treaty does not "say" that its "protections can only be enforced in the territory of the other party." Limiting relief to the courts of the other party, the court concluded, "flatly conflicts" with the treaty's purpose, which is to protect the property of U.S. nationals. The court added that this is "particularly because Iran's post-revolutionary courts cannot provide adequate remedies for U.S. claims." McKesson III, at 1107-1108; App. A, 10a-11a.

Article IV, Clause 1, of the Treaty, however, only requires that "Each High Contracting Party shall assure that" "the lawful contractual rights" of the "nationals and companies of the other High Contracting Party" "are afforded effective means of enforcement, in conformity with applicable laws." (Emphasis supplied.) There is no mention of a High Contracting Party providing effective means of enforcement for its own nationals in its domestic courts. In any event, Article III, Clause 2 of the Treaty makes it clear that enforcement in a national's own courts was purposely excluded. That clause provides that nationals of "either High Contracting Party shall

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[6] U.S. brief submitted in U.S. v. Cardan, (C.D.Cal.)(No. CV 99-13570-WJR), reprinted in Digest of US Practice in International Law (2000), pp. 316-317; U.S. brief submitted in Kwan v. United States, 84 F.Supp. 2d 613 (E.D.Pa. 2000), reprinted in Digest, supra, p. 491. Indeed, in an amicus brief filed in 1982 by the United States in Kalamazoo Spice Extraction Company v. The Provisional Military Government of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984), a case involving a Friendship, Commerce and Navigation ("FCN") treaty between the United States and Ethiopia very similar to the Treaty of Amity, the U. S. wrote that "it is not familiar with judicial precedent for interpreting treaties of the United States to confer private rights of action in U.S. courts for U.S. nationals."U.S. Am. Br., p. 29, n. 21.

have freedom of access to the courts of justice ... within the other High Contracting Party." (Emphasis supplied.)

Thus, the court of appeals' reliance on the language in Article IV, Clause 2, was wrong. That Article provides that the property of foreign nationals may be taken only for a public purpose and with just compensation. Reliance on such language alone to create a private right of action was expressly rejected by the Amerada Hess Court. 488 U.S. at 442.

As for the court of appeals' last point, that U.S. nationals cannot obtain justice in an Iranian court, the Treaty expressly provides a remedy where the courts of one party do not provide justice to the other, that is, negotiation between the two High Contracting Parties, Article XXI, Clause 1, and, that failing, resolution by the International Court of Justice, "unless the High Contracting Parties agree to settlement by some other pacific means," Article XXI, Clause 2.[7]

Under a line of authority dating back more than two hundred years, provisions in commercial treaties with foreign states conferring rights on foreign nationals in United States courts have been held to create a private cause of action for the foreign national. See, e.g., Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (treaty with United Kingdom provided British creditors with cause of action to prevent cancellation of their debts by Virginia); Hauenstein v. Lynham, 100 U.S. 483 (1880)(treaty with Switzerland provided Swiss national with cause of action to prevent Virginia from discriminating against Swiss on issue of inheritance); see, generally, Restatement (Third), § 111, Reporter's Note 5, pp.54-55(collecting cases). The court of appeals cited no authority, and there is none, for the proposition that the Treaty of Amity provides a U.S. national with a cause of action against a foreign sovereign in U.S. courts.

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[7] As set out in footnote 2, Iran offered to resolve the case through international arbitration. Thus, McKesson had an effective remedy before two neutral bodies, the International Court of Justice and an international arbitral panel. It chose not to avail itself of either remedy.

Nor have we have found any indication in the negotiating history of the Treaty that either the United States or Iran contemplated that the Treaty created a private right of action for nationals of either party in the nationals' own courts. A memorandum to the U.S. Embassy in Tehran from the Secretary of State at the time the treaty was being negotiated characterized the compensation provision of the treaty as its "essential nucleus," and went on to say that "[t]his provision, together with the provision ... regarding adjudication of disputes by the International Court of Justice, if accepted by Iran, should provide valuable assurances to the American oil companies and other American investors." Department of State Instruction A-18, July 23, 1954, p. 2.

A State Department official who testified in Congress at the time the Treaty and two other substantially identical treaties were under consideration, informed the Congress that an investor's remedy under the treaties if his property were taken was exhaustion of remedies in the local courts, followed by negotiation by the United States, and then international adjudication. See Commercial Treaties with Iran, Nicaragua, and The Netherlands: Hearings Before the Senate Comm. on Foreign Relations, 84 Cong., 2d Sess. (1956), at 11.

Scholarly commentaries have consistently held that Article XIII, Clause 2, unconditionally commits a final decision in a case such as this to the International Court of Justice. See R. Wilson, United States Commercial Treaties and International Law, 25 (1960)("in the last analysis, neither party to a treaty [containing the provisions of Article XX1, Clause 2] must accept as final the other party's interpretation or application of the treaty"); H. Walker, "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice," 5 Am.J.Comp.Law 229, 239 (1956)("unreserved acceptance of [ICJ] jurisdiction for ultimate determination of treaty rights, on an impartial legal basis").[8]

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[8] Mr. Walker was responsible for formulation of the postwar form of the FCN Treaties and negotiated several of them for the United States. Sumitomo Shoji America, Inc v. Avagliano et al., 457 U.S. 176, 182, n. 6 (1982).

In the Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 19 I.L.M. 553 (1980), a case arising out of the detention of the U.S. Embassy staff in Tehran in 1979, the International Court of Justice ruled that "Article XXI, paragraph 2, of the Treaty establishes the jurisdiction of the Court as compulsory for such disputes, unless the parties agree to settlement by some other means." Id. at 565, para. 52.

The Treaty of Amity is one of some two dozen Friendship, Commerce, and Navigation ("FCN") treaties negotiated by the United States after the Second World War. Appendix B of the U.S. amicus brief in Kalamazoo, supra, sets out the property protection clause in some 21 FCN treaties, including Article IV, Clause 2 in the Treaty of Amity. These property protection clauses are substantially the same.[9]

Rights and obligations under the Treaty are reciprocal. The court of appeals' opinion does not address Iran's argument that the court's reading of the Treaty in effect strips away the sovereign immunity of the United States in Iranian courts - not to mention the courts of the other two dozen sovereigns with which the United States has FCN treaties.

Quite clearly, this issue is of vital importance to the administration of commercial treaties in this country and merits review by this Court.

II. THE COURT OF APPEALS' INTERPRETATION OF "BASED UPON" CONFLICTS WITH NELSON AND MANY CIRCUIT COURT DECISIONS.

Seeking compensation for their claimed expropriated property, McKesson invoked the jurisdiction of the district

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[9] The foreign states are Belgium, Denmark, Ethiopia, France, Germany, Greece, Iran, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Netherlands, Nicaragua, Oman, Pakistan, Taiwan, Thailand, Togo, and Vietnam.

court under Clause 3 of the FSIA's commercial activity jurisdiction, §1605(a)(2). That clause allows jurisdiction where an action "is based ... upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." (Emphasis added).

In Saudi Arabia v. Nelson, 507 U.S. 349 (1993), the Court established the meaning of the term "based upon," which appears in each of the three clauses of §1605(a)(2), thus: "[T]he phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." Id., at 357. The Court rejected an interpretation that would give the term "based upon" the meaning of "a mere connection with, or relation to, commercial activity." Id. at 358.

The court below initially interpreted Nelson to hold "only that commercial- activity jurisdiction cannot exist absent some nexus between the elements of the cause of action and the commercial activity that forms the basis of jurisdiction." Footnote 4 (emphasis added). "Nexus" and "connection" are synonyms. Webster's Third International Dictionary, (1966), p. 1524. Quite clearly, the "some nexus" interpretation first adopted by the court below was inconsistent with the "elements of a claim" rule that was adopted by this Court in Nelson.

In its amended opinion, the court of appeals rewrote the sentence that Iran had challenged in its petition for rehearing, and said: "Nelson held that commercial activity jurisdiction cannot exist unless the commercial activity that forms the basis for jurisdiction also serves as the predicate for the cause of action." App. A, 7a. "Predicate", however, is just a synonym for "basis." Webster's Third International Dictionary, (1966), p. 1786. Nelson does not just rule that commercial activity jurisdiction cannot exist unless the commercial activity that forms the "basis" for jurisdiction also forms the "basis" for the cause of action. Nelson explains what "basis" means in this context, viz., in order to serve as a "basis" for a cause of action under the commercial activity exception, an activity must be an

element of the cause of action.[10] In neither opinion did the court of appeals even mention the "elements of a claim" rule.

The court below ruled that jurisdiction could be exercised over an act, the non-payment of dividends, whether or not it created a direct effect in the United States, on the ground that it had jurisdiction over other acts, the cut-off of commercial contacts, that, it found, did cause a direct effect in the United States. This is quite clearly contrary to the language of the direct effect clause. To acquire jurisdiction over an "act" under that clause, that same "act" must cause a direct effect.

The court below rewrote the direct effect clause to confer jurisdiction not over individual "acts" that are "in connection with a commercial activity" that "cause a direct effect in the United States," but over "commercial activity ... that ... causes a direct effect in the United States," whether or not the individual acts cause a direct effect. In its introduction, the opinion in fact so states in haec verba. McKesson III at 1104; App. A, 4a.

The opinion of the court below is in conflict with the decision of every Circuit Court that has ruled on this issue following Nelson. The other circuits have followed Nelson's "elements of a claim" rule directly, or have adopted other rules more restrictive than what is in effect the court of appeals' "some nexus" rule, in cases brought under Clause 3,[11] Clause

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[10] The opposite need not be true. Although any commercial activity for which damages are sought must be an element of the claim, every element of the claim need not be commercial activity. Nelson, supra, at 358, n. 4.

[11] E.g., Voest-Alpine v. Bank of China, 142 F.3d 887, 892 (5th Cir. 1998) (act must form basis of at least some element of the cause of action); Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir. 1995)(court must focus on those specific acts that form the basis of the suit); Federal Insurance Holding, etc. v. Rubin, 12 F.3d 1270, 1290-1291 (3rd Cir. 1993) (elements of a claim or causal link); Drexel Burnham etc. v. Galadari, etc., 12 F.3d 317, 330 (2d Cir. 1993) (elements of claim only); see Transatlantic Shiffahrtskontor v. Shanghai Foreign Trade, 201 F.3d

2,[12] and, of course, under Clause 1,[13] of the commercial activity exception.

The court of appeals' expansive reading of the third clause of §1605(a)(2) is plainly in conflict with this Court's opinion in Nelson, as well as the opinions of many Circuit Courts, and merits review by this Court.

III. THE COURT OF APPEALS' "PLACE OF PAYMENT" RULING CONFLICTS WITH WELTOVER AND MANY CIRCUIT COURT DECISIONS.

The Weltover Court ruled that an effect was "direct" within the meaning of the "direct effect" clause of the FSIA's commercial activity exception to sovereign immunity if it followed "as an immediate consequence of the defendant's ... activity." 504 U.S. at 618. There was a "direct effect" in that case because Argentina failed to pay interest on bonds as promised in New York. "Because New York was thus the place of performance of Argentina's ultimate financial obligation, the rescheduling of those obligations necessarily

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384, 390 (2d Cir. 2000) (act upon which action based must be "but for cause," and degree of closeness between acts giving rise to cause of action and those needed to establish jurisdiction considerably greater than common law causation requirements). The D.C. Circuit recognized the "elements of a claim" rule in Goodman Holdings v. Rafidain Bank, 26 F.3rd 1143 (1994)(action not based on Goodman's banking activities in U.S. because activities legally irrelevant to right to recover under letter of credit, which, because not payable in U.S., caused no direct effect in U.S.).

[12] E.g., Voest, supra, at 892 (5th Cir. 1998) (dictum); General Electric Capital v. Grossman, 991 F.2d 1376, 1384 (8th Cir. 1993). Clause 2 provides jurisdiction over an "act performed in the United States in connection with a commercial activity of the foreign state elsewhere."

[13] E.g., Sun v. Taiwan, 201 F.3d 1105, 1109-1110 (9th Cir. 2000); Rubin, supra, 12 F.3d at 1289 (3rd Cir. 1993). Clause 1 provides jurisdiction over "commercial activity carried on in the United States by a foreign state."

had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank was not forthcoming." Id. at 619.

The court of appeals' first opinion rejected outright Iran's argument that the denial of dividends could have no direct effect because the place of payment of Pak Dairy's financial obligation lay outside the U.S. See footnote 4. In its amended opinion, the court of appeals ruled that, in view of its interpretation of "based upon," Iran's direct effect argument was "irrelevant." McKesson III at 1106; App. A, 7a. However, as shown above, the court's interpretation of "based upon" is not consistent with Nelson. In consequence, the court of appeals' "place of payment" ruling is squarely put in issue here.

To date, this Court has not decided whether, in a breach of contract case brought by a U.S. plaintiff against a foreign state, an obligation to pay, or some other obligation to perform in the U.S., is a prerequisite for a direct effect, or whether an ultimate financial loss to a U.S. party is sufficient.

The court of appeals' ruling is contrary to the rulings of all other circuit courts that have addressed the issue. The Second, Ninth and Tenth Circuits reason that a direct effect in the United States is lacking in a breach of contract case unless there is an obligation to pay or otherwise perform in the United States under the contract.[14] Before this case, the D.C. Circuit

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[14] United World Trade, Inc. v. Mangyshlakneft Oil Production Association, 33 F.3d 1232 (10th Cir. 1994) (no direct effect in U.S. in action for breach of contract where no obligation to pay in U.S.); General Elec. Capital, supra, 991 F.2d at 1385-1386 (8th Cir. 1993) (financial loss to American corporations insufficient for direct effect); Antares Aircraft v. Federal Republic of Nigeria, 948 F.2d 90 (2d Cir. 1991), summarily rev'd, 505 U.S. 1215 (1992), aff'd, 999 F.2d 33, 36-37 (1993), cert. denied, 510 U.S. 1071 (1994) (unlawful detention of aircraft in Nigeria had no direct effect in U.S. despite financial loss to American partnership here); Gregorian v. Izvestia, 871 F.2d 1515, 1527 (9th Cir. 1989) (direct effect in U.S. in contract cases only where plaintiffs are U.S. citizens and contracts provided for payments to be made in the U.S.); Meadows v. Dominican Republic, 817 F.2d 517, 523 (9th Cir. 1987) (same); see Adler v. Nigeria, 107 F.3d 720, 730(2d Cir. 1997)(direct effect in U.S. because contract permitted Adler to specify

appeared to have adopted this reasoning.[15]

The Fifth and Sixth Circuits rely on this Court's "immediate consequence" language and reject what is called the "legally significant act" or "place of payment" test. The outcome, however, would have been the same in these cases, had the "place of payment" test been applied.[16]

In this case, the effect was particularly indirect. McKesson argued that Pak Dairy had denied McKesson its dividends because Pak Dairy had not, pursuant to McKesson's written request, opened a bank account for McKesson in Tehran and deposited McKesson's dividends, in Iranian rials,

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New York as place of payment, which he did).

[15] In Goodman, supra, the D.C. Circuit itself ruled, in a Clause 3 breach of contract case like this case, that there was no "immediate consequence" in the U.S. because no "United States location was designated as the 'place of performance' where money was supposed to have been paid." 26 F.3d at 1146. Goodman is thus in direct conflict with the court of appeals' opinion here, unless the requirement of an obligation to pay in the U.S. applies only where the plaintiff is an alien, as was the case in Goodman. That interpretation, however, would be at odds with the literal language of the "direct effect" provision, which, in setting out the direct effect requirement, draws no distinctions between citizens and aliens. In both Weltover, 504 U.S. at 619, and in Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489 (1983), the Court declined to draw distinctions between U.S. citizens and aliens in suits brought under the FSIA. No Circuit Court has applied this distinction in ruling whether there has been a direct effect.

[16] In Voest, 142 F.3d at 893-896 (5th Cir. 1998), the Fifth Circuit rejected the "legally significant act" test and ruled that failure to pay on a letter of credit in U.S. had a direct effect where the customary practice was to send payments wherever the presenting party specified and Houston, Texas, was specified. Id. at 893-896. The result would have been the same applying the "place of payment" test, as Judge Reavley, concurring, noted. Id. at 897 Citing Voest, the Sixth Circuit specifically rejected the "legally significant act" test in Keller v. Central Bank of Nigeria, 277 F. 3d 811, 817-818 (2002). Again, the choice of test made no difference. The court ruled that the defendant's failure to pay promised funds to a Cleveland, Ohio, account constituted a direct effect in the United States. Id. at 818.

in that account. See App. G, 106a, 112a. Even if Pak Dairy had been willing - and, under Iranian law, able - to open the bank account on McKesson's behalf and transfer the dividends to the account as requested, McKesson's own evidence established that no funds could be exchanged into U.S. dollars, or repatriated to the U.S., without a series of approvals, some asserted to be sovereign, by agencies of the Government of Iran, including the Iranian central bank.[17] This was true even before the Islamic Revolution of 1979. JA:1893-95. Under these circumstances, the "immediate consequence," required by the Fifth and Sixth Circuits, as well as by this Court's opinion in Weltover, for a direct effect is clearly lacking.

The effect of the court of appeals' ruling is to give U.S. courts jurisdiction over virtually any suit arising out of an overseas transaction in which a U.S. national claims to have suffered a loss from the acts of a foreign state.[18] The ruling is clearly in conflict with this Court's "immediate consequence" test, and warrants review by this Court.

IV. IRAN WAS ENTITLED TO SUMMARY JUDGMENT ON DIRECT EFFECT.

A. THE "CUT-OFF OF COMMERCIAL CONTACTS," UPON WHICH THE COURT OF APPEALS RELIED FOR A "DIRECT EFFECT," WAS NEITHER ACTIONABLE NOR DID IT CAUSE A DIRECT EFFECT.

Both McKesson and Iran relied on non-discriminatory Iranian law for purposes of deciding whether there had been a taking of McKesson's shareholding interest. In support of their motion for summary judgment, McKesson submitted just one

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[17] The action could not be based on central bank control of foreign exchange because such control is a sovereign activity. DeSanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1894 (5th Cir. 1985); see Weltover, supra, at 614.

[18] See United World Trade, supra, at 1239, and Voest, supra, at 897 (Judge Reavley concurring).

opinion on Iranian law, that of Mr. Katirai. That opinion addressed the question whether "Iranian law recognize[s] a cause of action by a minority shareholder of a joint stock company, where as recited in [McKesson's statement of material facts] the controlling shareholders and dominant members of the board of directors deprive the minority shareholder of dividend payments, shareholder communications, and the opportunity to participate and vote freely in shareholder meetings." It concluded that Iranian law did provide such a cause of action.[19]

Mr. Katirai's opinion itself made no other reference to "the deprivation of the opportunity to participate and vote freely in shareholder's meetings." The statement of material facts to which the opinion refers, however, does mention McKesson's withdrawal of its representatives from the board of directors in October, 1981, "because it had determined that the efforts to protect its equity interest and to play a meaningful role in the management of the company had proved futile."[20]

Nowhere in Mr. Katirai's opinion, nor anywhere else in McKesson's submissions in support of summary judgment, did it attempt to show that any other act by Pak Dairy, such as the cut-off of other commercial contacts relied on by the court below, was in violation of the non-discriminatory laws of Iran or any other law.

The district court based its ruling on the three factors mentioned by Mr. Katirai. By April, 1982, (1) McKesson had not received its dividends for a fourth consecutive year, (2) McKesson had had no voice in Pak's management since October of 1981, and (3) McKesson had received no shareholder communications from Pak Dairy after October, 1981. App. G, 115a-116a.

In McKesson II the court of appeals itself found that

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[19] Ex. 11, McKesson's 5/13/96 motion for partial summary judgment, §§10(A), 36.

[20] McKesson's 5/13/96 statement of material facts, §17.

McKesson was not relying on the cut-off of the other contacts as actionable acts causing a direct effect. The court wrote, "McKesson's theory was not that Iran's calling a halt to the flow of capital, equipment and personnel breached any legal obligation, but that stoppage was a direct consequence of Iran's interference with McKesson's 'rights to participate in the management of Pak Dairy.'" Id., at 350, n. 8; App. I, 167a (emphasis supplied). The cut-off of commercial contacts was a direct effect, not an actionable act causing a direct effect. Although this language was repeatedly brought to the attention of court of appeals in McKesson III, the court gave no reason why it reversed course and held that Pak Dairy's cut-off of contacts was the actionable act that caused a direct effect in the United States.

Nelson teaches that when a litigant invokes the direct effect clause of the commercial activity exception, the only acts that may be relied upon are actionable acts that themselves cause a direct effect. Thus McKesson could not rely on the cut-off of other commercial contacts as "acts" causing a direct effect because the cut-off was not shown to be actionable.

Even assuming that the cut-off of other commercial contacts could count as an actionable act, the court below never addressed Iran's argument that respondents conceded the cut-off did not cause a direct effect. A plaintiff must prove at trial all facts upon which a federal court's jurisdiction depends. McNutt v. General Motors, 298 U.S. 178, 187-190 (1935). On the cross-motions for summary judgment, Iran's direct effect argument, as set out in ¶9 of its statement of material facts, was that "None of the actionable acts that Iran is alleged to have committed in this case entailed an obligation to pay in the United States." JA:381. McKesson filed no statement of genuine issues in opposition and stated at oral argument that there were no genuine issues of fact for trial either on its motion for partial summary judgment or on Iran's cross motion for summary judgment. JA:1994. In consequence, if Iran's interpretation of Weltover and the cases following Weltover as explained above is correct, Iran demonstrated that the cut-off of commercial contacts did not cause a direct effect.

B. THE ONLY LEGALLY SIGNIFICANT ACT ON THE EXPROPRIATION CLAIM WAS THE SUPPOSED NON-PAYMENT OF DIVIDENDS, WHICH CAUSED NO DIRECT EFFECT.

Even if the cut-off of other commercial contacts could count as an actionable act that caused a direct effect, Iran was nevertheless entitled to summary judgment on McKesson's claim that its interest had been expropriated, defined by the district court as an "irreversible" deprivation of McKesson's "shareholding interest." App. G, 115a. This is because the denial of dividends was the essential element in the cause of action for expropriation. It was the "gravamen of the complaint," see Nelson, 507 U.S. at 357, quoting with approval from Santos v. Air France, 934 F.2d 890, 893 (7th Cir. 1991); it was what the case "boils down" to, see Nelson, 507 U.S. at 361. The receipt of dividends is by far the most important right of a shareholder. If McKesson could prove that Pak Dairy had unlawfully deprived it of the dividends on its shares, at some point a court could say that McKesson had been "irreversibly" deprived of its shareholding interest. If, on the other hand, the dividends were paid, regardless of whether all other commercial contacts were cut off, a court could not say McKesson had been deprived of its shareholding interest.

The other two factors on which Mr. Katirai and the district court relied are legally insignificant; the denial of shareholder communications was unimportant economically, and it was undisputed that the communications were to be provided only in Iran.

The district court's and the court of appeals' reliance on the resignation of McKesson's directors in October, 1981, to establish either an actionable act or direct effect, was clearly erroneous. McKesson had not been forced to remove the directors but had done so voluntarily. It conceded as much in its statement of material facts. See p. 21, supra. The Tribunal so found. 10 Iran-U.S. Cl.Tr.R. at 248, 250; JA:191, 193. Pak Dairy protested the withdrawal of the directors and repeatedly

asked McKesson to appoint new ones. Id. In any event, that McKesson withdrew its directors in 1981 cannot count as an act by Iran having a direct effect in the United States.

In consequence, the effect under Nelson and Weltover of the alleged denial of dividends beginning in 1981 was the outcome-determinative issue on direct effect jurisdiction. As we have shown, if Iran's interpretation of Weltover and its progeny is correct, Iran was therefore entitled to summary judgment because it had established that no actionable act alleged caused a direct effect.

V. IRAN WAS ALSO ENTITLED TO SUMMARY JUDGMENT ON THE MERITS BECAUSE IRAN'S UNOPPOSED AFFIDAVITS AND LEGAL OPINIONS DEMONSTRATED THAT THE DIVIDENDS HAD NOT BEEN UNLAWFULLY WITHHELD.

As just shown, the only substantial claim against Iran was the denial of dividends. In consequence, if Iran showed that the dividends had not in fact been unlawfully withheld, it was entitled to summary judgment on the merits of McKesson's expropriation claim. According to the court of appeals, Iran raised two genuine issues with respect to the denial of dividends, (1) whether Pak Dairy had adopted the "come to the company" requirement and (2) whether compliance with the requirement would have been futile. McKesson III at 1108-1110; App. A, 11a-15a. Iran, however, was entitled to summary judgment on both issues because the unopposed affidavits and legal opinions it submitted demonstrated that an Iranian court, acting without discrimination, would rule in its favor on both issues.

Mr. Katirai's opinion, the only one submitted by McKesson, did not address either issue.

Iran submitted one affidavit and two legal opinions to the effect that the "come to the company" procedure was a universal custom as well as a legal requirement in Iran. Iran

submitted seven separate legal opinions concluding that Pak Dairy was not in default under the circumstances of this case because McKesson had not complied with the "come to the company" requirement.

On the question whether an Iranian court would excuse compliance with the "come to the company" requirement on grounds of futility under the circumstances of this case, Iran submitted legal opinions by two members of the Iranian bar, one of whom was the expert on Iranian law at the United States Library of Congress. Both concluded that an Iranian court, acting without discrimination, would not excuse compliance with the requirement on this ground.

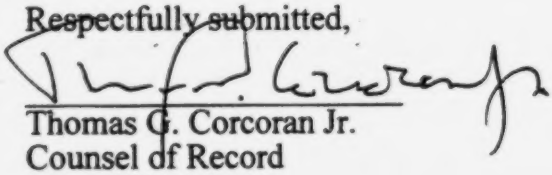
McKesson and OPIC did not contend that they lacked access to lawyers who would provide them with opinions on Iranian law or persons familiar with Iranian corporate practice who could provide them with affidavits on Iranian practice, but they provided no affidavits or legal opinions in opposition. In consequence, there was no reason to doubt the truthfulness of any of the legal opinions or affidavits that Iran submitted.

Because respondents filed no legal opinion on these issues in response to Iran's opinions, Iran was entitled to judgment in its favor. See, Universal Sales Co., Ltd. v. Silver Castle, 182 F.3d 1036, 1039 (9th Cir. 1999) (reversing district court refusal to accept unrebutted legal opinion on foreign law).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,



Thomas G. Corcoran Jr.
Counsel of Record
Mary-Ellen Noone
Berliner, Corcoran & Rowe, LLP
(202) 293-5555

Attorneys for Petitioner

Bruno A. Ristau
Of Counsel

April 11, 2002

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APPENDIX A

United States Court of Appeals,
District of Columbia Circuit

McKESSON HBOC, INC., et al.,
Appellees/Cross-Appellants,

v.

ISLAMIC REPUBLIC OF IRAN,
Appellant/Cross-Appellee.

Nos. 00-7157 and 00-7263.

Argued Oct. 1, 2001.
Decided Nov. 16, 2001.

Appeals from the United States District Court for the District of Columbia (No. 82cv00220).

Thomas G. Corcoran, Jr. argued the cause for appellant/cross-appellee. With him on the briefs was Mary-Ellen Noone.

Mark N. Bravin argued the cause for appellees/cross-appellants. With him on the briefs were Ralph N. Albright, Jr., Peter Buscemi and Mark R. Joelson.

Before EDWARDS, ROGERS and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge TATEL.

TATEL, Circuit Judge:

McKesson HBOC, Inc., an American corporation, owns a minority interest in an Iranian dairy. Following Iran's 1979 Islamic Revolution, the dairy cut off the flow of capital and other material to McKesson, froze out McKesson's board members, and stopped paying McKesson's dividends. After years of litigation, including two appeals to this court, the district court granted summary judgment for McKesson, holding the Islamic Republic of Iran liable for expropriating McKesson's equity in the dairy. Following a bench trial on the value of McKesson's holdings, the district court ordered Iran to pay over $20 million in compensation for, among other things, expropriated equity and withheld dividends. In this appeal, Iran argues that federal courts lack jurisdiction over it, that material issues exist as to its liability for expropriation, and that the district court erred in valuing McKesson's assets. McKesson cross-appeals, challenging the district court's assessment of simple rather than compound interest. We affirm in most respects. Jurisdiction exists pursuant to the Foreign Sovereign Immunities Act's exception for commercial acts of a foreign sovereign that cause direct effects in the United States. The district court's careful consideration of the valuation evidence easily survives clear-error review. And although the district court may have erred in finding that international law precludes awards of compound interest, it acted well within its broad discretion to grant simple interest. But because we find that genuine issues of material fact exist as to whether Iranian corporate law excused the dairy's withholding of dividends, we reverse the district court's grant of summary judgment on the issue of Iran's liability for expropriating McKesson's equity and remand that portion of the case for trial.

I.

For many years prior to Iran's 1979 Islamic Revolution, McKesson HBOC, Inc., appellee and cross-appellant, contributed capital and personnel to Sherkat Sahami Labaniat Pasteurize Pak, an Iranian dairy ("Pak Dairy"). McKesson's representatives made up a majority of Pak Dairy's board of directors.

Following the Revolution, McKesson's ties with Pak Dairy began to weaken. It no longer received its standard yearly dividends, and soon lost control of the dairy's board, withdrawing its last two directors in October, 1981. Since then, McKesson has neither participated in Pak Dairy's business nor received shareholder communications or compensation for its investment, even though it still owns a thirty-one percent interest in the dairy.

In 1982, McKesson, along with its insurer, the Overseas Private Investment Corporation (OPIC), filed suit in the United States District Court for the District of Columbia alleging that the Islamic Republic of Iran, appellant and cross-appellee, illegally expropriated McKesson's interest in Pak Dairy. Pursuant to Executive Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 24, 1981), McKesson's claim was transferred to the newly created Iran-United States Claims Tribunal which, by virtue of the Algiers Accords (which settled the Iran hostage crisis), had exclusive jurisdiction over suits involving American claims to frozen Iranian assets. *See generally* Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, Iran-U.S., 20 I.L.M. 224. Although the Claims Tribunal decided that Iran's interference with McKesson's rights had not amounted to an expropriation by January 19, 1981, the Tribunal's jurisdictional cut-off date, it did find that Pak Dairy had illegally withheld McKesson's 1979 and

1980 dividends. *Foremost Tehran, Inc. v. Iran,* 10 Iran-U.S. Cl. Trib. Rep. 228, 250 (1986). The Tribunal awarded McKesson in excess of $900,000 as compensation for withheld dividends, plus approximately $500,000 for related breach-of-contract claims. *Id.* at 252-53, 254-55, 257-58.

Renewing its claim in district court, McKesson argued that Iran had expropriated its equity in Pak Dairy after the Tribunal's jurisdictional cut- off date. Iran moved to dismiss, arguing primarily that the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1602-1611, rendered it immune from suit in federal court. The district court denied this motion, and we affirmed in part and remanded in part. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran,* 905 F.2d 438, 449-51 (D.C.Cir.1990) ("*McKesson I*"). In doing so, we held that McKesson had provided adequate evidence of federal jurisdiction pursuant to the FSIA exception for suits based on "commercial activity ... that ... causes a direct effect in the United States." 28 U.S.C. § 1605(a)(1); *see McKesson I,* 905 F.2d at 449-50. Subsequently, Iran again challenged federal jurisdiction, arguing among other things that an intervening Supreme Court decision, *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992), undermined *McKesson I. McKesson Corp. v. Islamic Republic of Iran,* 52 F.3d 346, 349 (D.C.Cir.1995) ("*McKesson II*"). Distinguishing *Weltover* and deferring to *McKesson I,* we affirmed the district court's denial of Iran's renewed motion to dismiss. *Id.* at 350-51.

With the jurisdictional issue seemingly--though as we shall soon see, not finally--resolved, both parties moved for summary judgment on liability. Granting summary judgment for McKesson, *McKesson Corp. v. Islamic Republic of Iran,* No. 82-220, mem. op. at 31, 1997 WL 361177 (D.D.C. June 23, 1997), the district court scheduled a bench trial to determine

damages. Just before trial, Iran once again moved to dismiss for lack of jurisdiction, arguing that the International Guaranty Agreement (IGA), which governs the resolution of claims against Iran to which the United States government and its instrumentalities are subrogated, requires arbitration rather than litigation. The district court denied the motion, heard several weeks of testimony on valuation, and then issued findings valuing McKesson's assets--including equity in Pak Dairy, dividends, and simple interest--at just over $20 million. *McKesson Corp. v. Islamic Republic of Iran*, mem. op. at 53, 116 F.Supp.2d 13, ---- (D.D.C.2000). The district court denied McKesson's subsequent motion for reconsideration of the court's assessment of simple rather than compound interest. *McKesson Corp. v. Islamic Republic of Iran*, No.82-220, mem. op. at 13 (D.D.C. Sept. 28, 2000).

Iran now appeals the grant of summary judgment on liability as well as the district court's valuation of McKesson's holdings in Pak Dairy. Iran also appeals the district court's rejection of its FSIA and IGA jurisdictional arguments. McKesson cross-appeals the denial of its motion for reconsideration of the decision to award only simple interest.

II.

We begin with Iran's jurisdictional arguments. A foreign nation's entitlement to sovereign immunity raises questions of law reviewable de novo. *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1169 (D.C.Cir.1994).

The FSIA immunizes foreign sovereigns, as well as their agents and instrumentalities, from federal court jurisdiction, *see* 28 U.S.C. §§ 1603(a), 1605, unless the case falls within one of several exceptions specified in the act, *see id.* § 1605; *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S.

428, 443, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) ("[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country...."). McKesson argues, and the district court held, that jurisdiction over Iran exists pursuant to the FSIA's exception for "any case ... in which the action is based upon a commercial activity ... of the foreign state ... that ... causes a direct effect in the United States." 28 U.S.C. § 1605(a)-(b).

This court has twice considered whether the commercial activity exception applies to McKesson's claim, holding both times that the alleged effects of Iran's expropriation--including the cut-off of the "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging" between the two companies, *McKesson I,* 905 F.2d at 451, as well as the abrupt end of "McKesson's role as an active investor," *McKesson II,* 52 F.3d at 350--were sufficiently direct to create federal jurisdiction. It is true, as Iran stresses, that our two earlier decisions found McKesson's jurisdictional showing sufficient only to survive a motion to dismiss, *id.* at 351, whereas this time we review a district court order granting summary judgment. Though we do not here assume the validity of McKesson's factual assertions, *see United States v. Gaubert,* 499 U.S. 315, 327, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991), this distinction makes no difference, for Iran does not dispute the particular facts on which our two earlier decisions relied. Indeed, the district court, reviewing the record without obligation to assume the veracity of either party's assertions, cited the same facts that *McKesson I* and *McKesson II* found sufficient for "direct effects" jurisdiction. *See McKesson Corp. v. Islamic Republic of Iran,* No. 82-220, mem. op. at 10 n.10, 1997 WL 361177 (D.D.C. June 23, 1997). Because we are presented with jurisdictional facts identical to the ones relied on by our two earlier decisions, and because Iran does not challenge the veracity of those facts (it challenges only their

sufficiency), the "law of the case" doctrine requires us to follow those two decisions. *McKesson II,* 52 F.3d at 350 ("[L]aw-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court.") (quoting *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C.Cir.1995)) (internal quotation marks omitted). As we said in *McKesson I,* "the alleged effects of freezing-out American corporations in their ownership of Pak Dairy are at least as substantial and direct as effects alleged in prior cases in which this court and other circuits have found 'direct effects.' " *McKesson I,* 905 F.2d at 451.

Iran argues that even if some elements of its expropriation had direct effects in the United States, federal courts may not exercise jurisdiction over one particular aspect of that claim: Pak Dairy's withholding of McKesson's dividends. In support of this proposition, Iran argues first that in *Kingdom of Saudi Arabia v. Nelson,* 507 U.S. 349, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993), the Supreme Court established an exclusionary principle under which no fact that could not have independently served as grounds for jurisdiction may serve as a basis for a foreign state's liability, and second, that the "direct effects" exception to claims based on commercial transactions does not apply where, as here, the place of payment lies outside the United States. In our view, the first argument has no merit, thus rendering the second irrelevant. *Nelson* held that commercial-activity jurisdiction cannot exist unless the commercial activity that forms the basis for jurisdiction also serves as the predicate for the plaintiff's substantive cause of action. *See* 507 U.S. at 357-58, 113 S.Ct. 1471. Here, McKesson's extensive showing of direct effects flowing from the commercial activity on which its cause of action rests establishes the nexus found lacking in *Nelson.* Regardless of whether denial of dividends alone would give rise to federal court jurisdiction under the FSIA's commercial-activity

exception, because the net effect of Pak Dairy's cut-off of commercial ties included not just nonpayment, but also the cessation of "the flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging," *McKesson I,* 905 F.2d at 451, the district court rightly considered the dividends issue both in determining that Iran had expropriated McKesson's equity interest and in awarding damages for that expropriation.

Iran's alternative jurisdictional argument rests on the International Guaranty Agreement's arbitration clause: "[A]ny claim against the Government of Iran to which the Government of the United States may be subrogated as a result of any payment under such guaranty shall be the subject of direct negotiation between the two Governments." Agreement on Guaranty of Private Investments, Sept. 17, 1957, U.S.-Iran, 8 U.S.T. 1599, 1600-01. According to Iran, this clause applies to OPIC's claims because OPIC insured McKesson's interest in Pak Dairy, thus precluding federal court jurisdiction. Acknowledging that OPIC is a government instrumentality within the meaning of the IGA, McKesson argues that Iran has waived its IGA argument. As McKesson points out, Iran has actively litigated this case for nine years, never once mentioning the arbitration clause nor attempting to begin IGA arbitration proceedings. Iran responds that subject-matter jurisdiction cannot be waived.

We need not determine whether Iran waived this defense, however, for in our view, although the IGA might well bar *OPIC* from proceeding, it has no effect on the district court's jurisdiction over *McKesson's* claims. Even though OPIC has compensated McKesson for part of its loss, McKesson still owns title to its equity in Pak Dairy and to its unpaid dividends, and it is well- settled that where an insured party holds title to confiscated property, the title holder is the appropriate party to

bring a claim for compensation. *See Mobile & Montgomery Ry. Co. v. Jurey,* 111 U.S. 584, 593, 4 S.Ct. 566, 28 L.Ed. 527 (1884); *Foremost Tehran,* 10 Iran-U.S. Cl. Trib. Rep. at 239 ("[T]he governing law of the settlement agreements, that of the District of Columbia, ... like other common law systems, provides that an insured party who assigns a limited interest to its insurer is the proper party to bring a claim for compensation for the entire loss."); Restatement (Second) of Trusts § 280 (1959). The settlement agreement between McKesson and OPIC states that McKesson will "maintain the legal title in and to all of the aforesaid items for the benefit of and in trust for OPIC." *Foremost Tehran,* 10 Iran-U.S. Cl. Trib. Rep. at 238-39 (quoting August, 1981 settlement agreement between OPIC and McKesson). Relying on this language, the Claims Tribunal held that McKesson "is legally entitled to pursue a claim for recovery of the insured portion of its losses as well as the uninsured portion.... [R]ecovery by [McKesson] of a measure of compensation from its insurers cannot affect its title to the claim against [Iran]." *Id.* at 239. The IGA thus presents no bar to federal court jurisdiction in this case.

III.

This brings us to Iran's contention that the district court prematurely granted summary judgment on liability in McKesson's favor. A court may grant summary judgment only when it finds "no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). To defeat a motion for summary judgment, the opposing party (for purposes of this issue, Iran) must demonstrate the existence of disputed issues by reference to affidavits or other materials that "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The court must resolve any doubts and make all reasonable inferences in favor of the opposing party. *Abraham*

v. Graphic Arts Int'l Union, 660 F.2d 811, 814-15 (D.C.Cir.1981). We review grants of summary judgment de novo. *Summers v. Dep't of Justice,* 140 F.3d 1077, 1078 (D.C.Cir.1998).

Iran first challenges the district court's conclusion that an agreement between Iran and the United States, the 1955 Treaty of Amity, gave McKesson a right to recover its expropriated property. Although treaties are the "supreme Law of the Land," U.S. Const. art. VI, cl. 2, they provide no basis for private lawsuits unless implemented by appropriate legislation or intended to be self-executing, *see Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 808 (D.C.Cir.1984) (Bork, J., concurring), *cert. denied,* 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985). If a treaty contains language clearly indicating its status as self-executing, courts regard that language as conclusive. *See Cardenas v. Smith,* 733 F.2d 909, 918 (D.C.Cir.1984); *see also Tel-Oren,* 726 F.2d at 809 (Bork, J., concurring) (noting that treaties that "speak in terms of individual rights" may be regarded as self-executing). The Treaty of Amity contains just such language: It explicitly creates property rights for foreign nationals, *see* Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, U.S.-Iran, art. IV, cl. 2, 8 U.S.T. 899, 903 ("[P]roperty [of foreign nationals] shall not be taken except for a public purpose, nor shall it be taken without just compensation."), and contemplates judicial enforcement of those rights, *see id.* art. IV, cl. 1 ("Each High Contracting Party ... shall assure that [the] lawful contractual rights [of foreign nationals] are afforded effective means of enforcement....").

Iran does not dispute that the Treaty of Amity creates enforceable rights, but instead contends that its clause stating that "[p]roperty of nationals and companies of either High Contracting Party, including interests in property, shall receive

the most constant protection and security within the territories of the other High Contracting Party ... ," Treaty of Amity art. VI, cl. 2, only "confers a right of action on an Iranian citizen in a U.S. court," Appellant's Opening Br. at 30. As the district court convincingly observed, however, although this language suggests that one party will receive protections within the territory of the other party, it doesn't say that those protections can only be enforced in the territory of the other party. *McKesson Corp. v. Islamic Republic of Iran*, No. 82-220, mem. op. at 27-26, 1997 WL 361177 (D.D.C. June 23, 1997). Such a limited interpretation, moreover, flatly conflicts with the treaty's purpose--protecting property of U.S. nationals--particularly because Iran's post-revolutionary courts cannot provide adequate remedies for U.S. claims. *See Rockwell Int'l Systems, Inc. v. Citibank, N.A.*, 719 F.2d 583, 587-88 (2d Cir.1983) (noting that federal courts have "consistently rejected" the proposition that the post-revolutionary Iranian court system can afford adequate remedies to U.S. claimants).

Iran next argues that summary judgment was inappropriate because it raised genuine issues of material fact as to whether Pak Dairy's refusal to pay McKesson's dividends was justified by McKesson's failure to comply with Iranian corporate law--specifically, the requirement that shareholders must "come to the company" to collect their dividends. Though skeptical of this requirement, the district court granted summary judgment because, even if the requirement existed, McKesson's compliance with it would have been futile. This is a tricky issue, but reviewing the record ourselves, we think Iran has raised genuine issues of material fact sufficient to survive summary judgment on liability.

We begin with Iran's contention that its corporate law requires shareholders to "come to the company"--that is, to

physically appear at a company's office--in order to collect dividends. McKesson argues that this requirement merely reflects non-binding custom and therefore that it could not excuse Pak Dairy's non-payment of dividends. This issue, like all determinations of foreign law, may be resolved at summary judgment. *See* Fed.R.Civ.P. 44.1; 9 Charles Wright & Arthur R. Miller, Federal Practice and Procedure § 2446, at 656-58 (2d ed. 1995).

Iran's numerous affidavits suggest that in Iran, "it is assumed that there is a legal requirement of physically appearing at the company with a receipt. In a proceeding in an Iranian court, the proponent of the argument that an Iranian company was required to pay dividends in any other way would be put to a very heavy burden of proof and every inference would be taken against him." Fakhari Aff. IV ¶ 9. Iran's affidavits also show that where a "come to the company" requirement prevails, a corporation may not be held liable for nonpayment unless and until it denies a shareholder's valid, in-person request for dividends. *See* Fakhari Aff. I ¶ 13; Fakhari Aff. II ¶ 3. The affidavits, however, fall short of proving that this general practice reflects a legal requirement applicable to all Iranian corporations. Indeed, Iran's experts unanimously state that whatever the prevailing custom and practice, Iranian law, reflected in Article 57 of Iran's Commercial Code, permits corporate boards to select any method of disbursing dividends. *See* Dadyar Aff. I ¶ 7; Fakhari Aff. I ¶ 14.

Thus, while we agree with the district court that no general principle of Iranian corporate law excuses Pak Dairy's withholding of McKesson's dividends due to its failure to come to the company, the record contains testimony that Iranian law permitted Pak Dairy's board of directors to adopt such a binding requirement. To survive summary judgment, then, Iran need only make a credible showing that Pak Dairy exercised its

discretion to implement a "come to the company" requirement. We think it has made such a showing. Pak Dairy's chief accountant states in his affidavit that "dividends are paid to shareholders by means of a cheque, and the shareholders must come to Pak Dairy to receive the cheque. The cheque is delivered to the shareholder against his receipt in the Company's documents, especially prepared for this purpose after his identity and ownership is established by the Company's officials." Dadyar Aff. I ¶ 7. The chief accountant further characterized this policy as "the mode of payment chosen by Pak Dairy ... [s]ince long ago, in particular in 1981 and 1982 and up to the present." Dadyar Aff. II ¶ 2.

Calling these affidavits "self-serving, vague, and uncorroborated," McKesson argues that they are insufficient to establish a genuine issue of material fact. Appellee's Opening Br. at 26. It is true that the chief accountant's affidavits refer to no documents supporting his assertions, and that we have held under some circumstances--for example, in *Doe v. Gates,* 981 F.2d 1316 (D.C.Cir.1993)--that a party relying on unsupported affidavits cannot survive summary judgment. The inadequate affidavit in *Gates*--submitted by the plaintiff in a discrimination case--had two critical defects not present here: The plaintiff-affiant had no direct knowledge of company policy, and the defendant had made an extensive showing that no discriminatory policy existed. *Id.* at 1322-23; *see also id.* at 1323 (granting summary judgment in part because plaintiff failed to "provide[ ] some direct evidence of someone having knowledge of th[e discriminatory] policy asserting it to exist"). Here, Pak Dairy's chief accountant provided firsthand testimony of his company's policy--specifically, that it had a "come to the company" requirement--and McKesson has submitted no evidence to the contrary. Under these circumstances, we think Iran's affidavits sufficient to preclude summary judgment, particularly in view of the generous reading we owe the

opposing party's evidence at this stage.

McKesson argues that even if Pak Dairy had a "come to the company" requirement, summary judgment was still justified because compliance with such a requirement would have been futile. The district court agreed, relying on a 1980 telex to McKesson in which Pak Dairy announced that it would not pay "any sums of money for any reason to foreign share holders." Telex from Pak Dairy to Foremost-McKesson (May 27, 1980). Although the district court acknowledged (in a footnote) that Pak Dairy had sent a subsequent telex in November, 1981 expressing "its readiness for taking proper measures ... [a]s regards the payment of [McKesson's] dividend," Telex from Pak Dairy to Foremost-McKesson (Nov. 11, 1981), the court dismissed the latter communication as merely an invitation to negotiate, which it regarded as "inconsequential" because "McKesson was under no legal obligation to settle for less than the amount to which it was entitled as a shareholder." *McKesson Corp. v. Islamic Republic of Iran*, No. 82-220, mem. op. at 22, 1997 WL 361177 (June 23, 1997). However plausible the district court's careful reading of the competing evidence, the role of the court at summary judgment is not to resolve the issue, but to determine whether the available evidence creates a genuine issue of fact for trial. *Abraham*, 660 F.2d at 814. Moreover, the district court plausibly inferred that in light of ongoing negotiations pursuant to the Algiers Accords, Pak Dairy's second telex represented a settlement overture, not an offer to give McKesson its dividends. However, because the opposite inference was no less plausible, the district court should have resolved the two competing, reasonable inferences in favor of Iran, the party opposing summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Implying nothing about the relative strength of the two telexes, we think the issue sufficiently close to require a trial on

McKesson's futility claim, as well as Iran's "come to the company" defense.

IV.

Next, Iran challenges the district court's valuation of McKesson's assets. Although, in view of our remand, we need not address this issue, we will consider it because it is fully briefed and because resolving it now will avert a second appeal should McKesson prevail. *See Jackson v. District of Columbia,* 254 F.3d 262, 271 (D.C.Cir.2001) (commenting on the merits of an otherwise moot issue because of the possibility that it might "arise again in a new trial"); *Martini v. Fed. Nat'l Mortgage Ass'n,* 178 F.3d 1336, 1348 (D.C.Cir.1999) (same).

A generous standard governs our review. The trial court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness." Fed.R.Civ.P. 52(a). "If the district court's account of the evidence is plausible in light of the record, the court of appeals may not reverse it." *Anderson v. City of Bessemer,* 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

The district court's careful consideration of the evidence and testimony on valuation easily survives this highly deferential standard. Not only do the district court's valuation findings fall well within the realm of plausibility, but in reaching them the court relied heavily on its own assessment of the credibility of the two competing expert witnesses. Such findings, the Supreme Court has warned, "can virtually never be clear error." *Id.* at 574, 105 S.Ct. at 1511.

Only two of Iran's challenges require even brief consideration. First, Iran claims that the district court erred

when calculating the amount of its award by converting rials to dollars at the official exchange rate prevailing at the time of the expropriation. According to Iran, the district court should have used a different, "open market" exchange rate. To the extent that this argument applies to the valuation of McKesson's equity, Iran is estopped from arguing that the district court committed reversible error because its own expert witness used the official exchange rate in converting rials to dollars in his equity valuation. *See Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 991 F.2d 1533, 1539-40 (11th Cir.1993) ("[I]t is a 'cardinal rule' of appellate procedure 'that a party may not challenge as error a ruling or other trial proceeding invited by that party.' ") (citation omitted). To the extent that the argument applies to the district court's valuation of McKesson's dividends, we think the district court's decision to use the official--rather than an "open market"-- exchange rate rests on more than enough evidence to survive clear-error review. Particularly convincing to us, the district court relied on decisions of the Iran-U.S. Claims Tribunal, which invariably used the official exchange rate in converting rials to dollars. *McKesson Corp. v. Islamic Republic of Iran*, 116 F.Supp.2d 13, 39 (D.D.C.2000).

Second, Iran claims that the district court erred by awarding McKesson the value of its 1982 dividend without reducing its equity valuation by the same amount. Again, this argument is barred by estoppel: Iran's trial evidence--including the submissions of its own expert witness--failed to deduct the 1982 dividend from its proposed valuation. In any event, no double- counting occurred. Both experts valued McKesson's equity by projecting Pak Dairy's 1982 earnings into the future, *McKesson Corp. v. Islamic Republic of Iran*, 116 F.Supp.2d at 39 (D.D.C.2000), while the 1982 dividend was based on Pak Dairy's 1981 earnings.

V.

In its cross-appeal, McKesson challenges the district court's assessment of simple rather than compound interest. According to McKesson, the district court erred by holding that in light of its "finding that the clear majority of international courts have historically awarded only simple interest," *McKesson Corp. v. Islamic Republic of Iran*, No. 82-220, mem. op. at 2 (Sept. 28, 2000), customary international law *required* such an award. We review determinations of international law de novo. *See Echeverria-Hernandez v. INS*, 923 F.2d 688, 692 (9th Cir.1991) (applying de novo review to question of international law), *vacated on other grounds by* 946 F.2d 1481 (9th Cir.1991); *see also* Fed.R.Civ.P. 44.1 ("[A]n issue concerning the law of a foreign country ... shall be treated as a question of law.").

McKesson argues that the district court had no discretion to award simple interest. For this proposition, McKesson relies on the Treaty of Amity, which states that property belonging to nationals and companies of the United States and Iran "shall not be taken ... without the prompt payment of just compensation," and that "[s]uch compensation shall ... represent the full equivalent of the property taken." Treaty of Amity, art. IV, cl. 2. In our view, however, the phrases "just compensation" and "full equivalent," on which McKesson relies, are far too ambiguous to require awards of compound interest.

Although we thus reject the proposition that the Treaty of Amity requires compound interest, we think McKesson makes a convincing case that contemporary international law does not, as the district court seems to have thought, require simple interest. The only source the district court relies on that unequivocally states that "compound interest is not allowable"

under international law assessed the state of that law over fifty years ago. MARJORIE M. WHITEMAN, 3 DAMAGES IN INTERNATIONAL LAW 1997 (1943). And although the Iran-U.S. Claims Tribunal has never once awarded compound interest, other international tribunals have. *Compare McKesson Corp. v. Islamic Republic of Iran*, 116 F.Supp.2d at 41 ("[T]he Tribunal has never awarded compound interest."), *and, e.g., Anaconda-Iran, Inc. v. Iran*, 13 Iran-U.S. Cl. Trib. Rep. 199, 234-35 (1988) (refusing claimant's request for award of compound interest even though contract court was enforcing stipulated that such award was appropriate), *with, e.g., Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, 39 I.L.M. 1317, 1332-34 (Int'l Ctr. for Settlement of Inv. Disputes 2000) (awarding compound interest), *and Kuwait v. Am. Indep. Oil Co. (Aminoil)*, 21 I.L.M. 976, 1042 (1982) (same). Indeed, most contemporary sources, including the authority relied on most heavily by Iran, take the view that "although compound interest is not generally awarded under international law or by international tribunals, special circumstances may arise which justify some element of compounding as an aspect of full reparation." James Crawford, *Third Report on State Responsibility Submitted to the International Law Commission of the United Nations*, 2 Y.B.I.L.C. 50 (2000).

Accordingly, although customary international law may favor awards of simple interest, we think the district court erred in holding that it requires such awards. Had the district court relied solely on this holding, reversal might have been appropriate. In denying McKesson's motion for reconsideration, however, the district court held that "even if customary international law authorizes an award of compound interest at the discretion of the awarding body, this Court finds that the almost uniform practice of awarding only simple interest is a relevant and compelling consideration in the

only simple interest is a relevant and compelling consideration in the exercise of that discretion." *McKesson Corp. v. Islamic Republic of Iran*, No. 82-220, mem. op. at 12 (Sept. 28, 2000).

[20] Reviewing this element of the district court's rejection of McKesson's motion for reconsideration only for abuse of discretion, *see Anyanwutaku v. Moore*, 151 F.3d 1053, 1058 (D.C.Cir.1998), we find none. It is true, as McKesson points out, that some federal common-law principles require courts to "make the plaintiff whole." Appellee's Opening Br. at 65. Even if these principles support awards of compound interest in tort cases, however, they fall well short of proving that the district court abused its discretion, particularly in light of the court's reliance on a far more relevant authority: the decisions of the Claims Tribunal, which invariably awards simple interest.

VI.

We affirm the district court's holdings that federal courts have subject- matter jurisdiction over Iran under the FSIA's commercial-activity exception, that the IGA does not preclude federal jurisdiction over McKesson's claims, and that the Treaty of Amity gives McKesson a right to recover its expropriated property. We reverse the district court's summary judgment in favor of McKesson on liability and remand for trial on the "come to the company" and futility issues. The district court's valuation of McKesson's assets and its assessment of simple interest are affirmed to the extent that those judgments are not rendered moot after trial.

So ordered.

APPENDIX B

FILED
JANUARY 11, 2002
CLERK, UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2001

No. 00-7157

82cv00220

Foremost Tehran, Inc., et al.,
Appellees

v.

Islamic Republic of Iran,
Appellant

Financial Organization for the Expansion of Ownership
of Productive Units, et al.,
Appellees

Consolidated with 00-7263

BEFORE: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant/cross-appellee's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

APPENDIX C

FILED
JANUARY 11, 2002
CLERK, UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 2001

No. 00-7157

McKesson HBOC, Inc., et al.,
Appellees/Cross-Appellants

v.

Islamic Republic of Iran,
Appellant/Cross-Appellee

Consolidated with 00-7263

Appeals from the United States District Court

for the District of Columbia

(No. 82cv00220)

Before: EDWARDS, ROGERS and TATEL, *Circuit Judges*.

ORDER

Upon consideration of the appellants' petition for rehearing, filed December 31, 2001, it is

ORDERED that the opinion in McKesson HBOC, Inc. v. Islamic Republic of Iran, 271 F.3d 1101 (D.C. Cir. 2001), be amended as follows:

(1) The paragraph beginning "Iran argues that even if some elements of its expropriation . .. ." be deleted in its entirety.

(2) The following paragraph be inserted in its place:

> "Iran argues that even if some elements of its expropriation had direct effects in the United States, federal courts may not exercise jurisdiction over one particular aspect of that claim: Pak Dairy's withholding of McKesson's dividends. In support of this proposition, Iran argues first that in Kingdom of Saudi Arabia v. Nelson, 507 U.S. 349 (1993), the Supreme Court established an exclusionary principle under which no fact that could not have independently served as grounds for jurisdiction may serve as a basis for a foreign state's liability, and second, that the "direct effects" exception to claims based on commercial transactions does not apply where, as here, the place of payment lies outside the United States. In our view, the first argument has no merit, thus rendering the second irrelevant. Nelson held that commercial-activity jurisdiction cannot exist unless the commercial activity that forms the basis for jurisdiction also serves as the predicate for the plaintiff's substantive cause of action. See 507 U.S. at 357-58. Here, McKesson's extensive showing of direct effects flowing from the commercial activity on which its cause of action

rests establishes the nexus found lacking in Nelson. Regardless of whether denial of dividends alone would give rise to federal court jurisdiction under the FSIA's commercial-activity exception, because the net effect of Pak Dairy's cut-off of commercial ties included not just nonpayment, but also the cessation of "the flow of capital, management personnel, engineering data, machinery, equipment, materials, and packaging," McKesson I, 905 F.2d at 451, the district court rightly considered the dividends issue in both in determining that Iran had expropriated McKesson's equity interest and in awarding damages for that expropriation."

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

APPENDIX D

Mandate
Pursuant to the provisions of
Fed. R. App. P. 41 (a)
March 13, 2002
By: Michael C. McGrail, Deputy Clerk
UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT
OF COLUMBIA CIRCUIT
FILED: NOVEMBER 16, 2001

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2001

No. 00-7157

McKesson HBOC, Inc., et al.,
Appellees/Cross-Appellants

v.

Islamic Republic of Iran,
Appellant/Cross-Appellee

Consolidated with 00-7263

Appeals from the United States District Court

for the District of Columbia

(No. 82cv00220)

Before: EDWARDS, ROGERS and TATEL, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in these causes is hereby affirmed in part and reversed in part, and the cases are remanded to the District Court for further proceeding consistent with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:/s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

Date: November 16, 2001

Opinion for the court filed by Circuit Judge Tatel

APPENDIX E

FILED
MAY 26, 2000
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

United States District Court, District of Columbia

McKESSON CORPORATION; Foremost Tehran, Inc.; Foremost Shir, Inc.; Foremost Iran Corporation; and Overseas Private Investment Corporation,

Plaintiffs,

v.

THE ISLAMIC REPUBLIC OF IRAN; Financial Organization for the Expansion of Ownership of Productive Units; National Investment Company of Iran; Industries and Mines Bank; Foundation for the Oppressed; and Sherkat Sahami Labaniat Pasteurize Pak,

Defendants.

No. 82-00220(TAF)

May 26, 2000

Mark Rene Joelson, Washington, DC, Ralph N. Albright, Jr., Joseph P. Griffin, Mark Neil Bravin, Morgan, Lewis & Bockius, L.L.P., Washington, DC, for Plaintiffs.

Bruno Alexander Ristau, Andrews & Kurth, LLP, Washington, DC, Henry M. Lloyd, Boykin & Casano, P.C., Washington, DC, Thomas Gardiner Corcoran, Jr., Mary-Ellen Noone, Berliner, Corcoran & Rowe, L.L.P., Washington, DC, for Defendants.

Michaerl F. Hertz, Joan E. Hartman, U.S. Dept. of Justice, Washington, DC, for U.S.

MEMORANDUM-OPINION

FLANNERY, District Judge.

I. Introduction

On June 23, 1997, this Court granted Plaintiffs' motion for summary judgment on the issue of liability, finding that Defendant Islamic Republic of Iran ("Iran"), acting through its co-defendants, had expropriated Plaintiff McKesson's 31% interest in an Iranian dairy company, the Sherkat Sahami Labaniat Pasteurize Pak ("Pak Dairy"), in April of 1982.[1] *See McKesson Corp. v. Islamic Republic of Iran*, Civ. A. 82-220, 1997 WL 361177 at *12 (D.D.C. June 23, 1997). This Court further held as a matter of law that Iran had wrongfully withheld

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[1] "McKesson" collectively refers to all plaintiffs in this case other than the Overseas Private Investment Corporation.

from McKesson the payment of dividends declared by Pak Dairy in 1981 and 1982 (hereinafter the "1981 dividend" and "1982 dividend" respectively) and that Iran could be held liable in federal court for the expropriation and failure to pay dividends under the Treaty of Amity and customary international law. *Id.*, Mem. Op. at 24-31, 1997 WL 361177 at * 12-*15; *see* Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, 8 U.S.T. 899 (1957). Between January 18 and February 17, 2000, a bench trial was held to determine the appropriate amount of damages. Iran was the only defendant appearing at trial.[2] In their case-in-chief, Plaintiffs first presented the testimony of Fred A. Loichinger ("Loichinger"), Chief Engineer of Pak Dairy from 1976 to 1978, and Robert C. Carpenter ("Carpenter"), a financial investment analyst and foreign investment manager for McKesson during the relevant period. Both testified regarding the condition of Pak Dairy up to 1978 and certain proposed expansions of its business. Plaintiffs also read into the record certain portions of the deposition of Alireza Dadyar ("Dadyar"), the then-Senior Accountant of Pak Dairy and in 1982 its Deputy Chief Accountant. As their fourth fact witness, Plaintiffs put on Leonard A. Patterson ("Patterson"), McKesson's Associate General Counsel, who testified chiefly regarding the value of McKesson's dividends for the years 1981 and 1982. Finally, Plaintiffs put on an appraisal expert, Robert Reilly ("Reilly"), to offer an expert opinion on the value of McKesson's equity interest in Pak Dairy at the time of the expropriation.

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[2] As the remaining Defendants have never filed an answer or otherwise appeared, default has been entered against each by the Clerk, and accordingly, the trial for damages doubled as an *ex parte* determination of damages against the defaulting parties pursuant to Fed.R.Civ.P. 55(b)(2).

In Iran's case-in-chief, it put on Dadyar as a fact witness to testify to the condition of Pak Dairy in the early 1980s, Dr. Gholam H. Vafai ("Vafai") as an expert on Iranian law to authenticate certain Iranian legal documents and Anatole Richman ("Richman") as an appraisal expert offering a contrary view of the value of McKesson's interest in Pak Dairy in April of 1982.

In Plaintiffs' rebuttal case, Reilly gave further testimony. Plaintiffs also put on Professor Shaul Bakhash ("Bakhash") as an expert on Iranian history to testify to the absence of bombing in Tehran in 1981 and 1982.

On March 16, 2000, the parties made their closing arguments. Now, upon reviewing the testimony and exhibits in evidence, as well as the relevant law, the Court enters the following findings of fact and conclusions of law in accordance with Fed.R.Civ.P. 52(a). In making its findings and conclusions, the Court bears in mind that the burden of proving the amount of damages is upon the Plaintiffs. *See Samaritan Inns, Inc. v. District of Columbia,* 114 F.3d 1227, 1235 (D.C.Cir.1997); *Gould v. U.S.*, 160 F.3d 1194, 1197 (8th Cir.1998); *Aeronca, Inc. v. Style-Crafters, Inc.*, 546 F.2d 1094, 1096 (4th Cir.1976).

II. Findings of Fact

A. The Plaintiffs

The Plaintiffs include four United States corporations which hold formal title to the expropriated shares in Pak Dairy: McKesson HBOC, Inc. and three wholly owned subsidiaries, Foremost Tehran, Inc., Foremost Shir, Inc. and Foremost Iran Corp. When this litigation commenced, McKesson HBOC, Inc. was named Foremost McKesson, Inc. It changed its name to McKesson Corporation on July 27, 1983 following the sale of

all of its dairy interests around the world. In January of 1999, it adopted its current name. McKesson's total equity interest in Pak Dairy is 31%, with 10% held by each of the three subsidiaries and 1% held by McKesson HBOC, Inc.

The remaining co-plaintiff is the Overseas Private Investment Corporation ("OPIC"), an agency of the United States which insures private overseas investments of United States nationals. *See* 22 U.S.C. § 2191. OPIC had insured McKesson's interests in Pak Dairy and seeks to recover monies paid in settlement of McKesson's insurance claim.

B. Iran

Throughout the 1960s and for most of the 1970s, Iran was governed by Mohammad Reza Pahlavi ("the Shah"). However, political turmoil began in the last half of 1978 with labor strikes and general unrest and culminated later that year in the Iranian Revolution ("Revolution"). In December of 1978, the Shah left the country and in February of 1979, a new government was formed based on the rule of Islamic law and following a far more socialist approach to regulating the economy than the previous regime had taken. Most dramatically, the new government nationalized a number of industries such as oil, gas, railways, fisheries, metal, shipping, aircraft and automobiles. While it did not nationalize the dairy industry, it maintained strict price controls over dairy products and also controlled the distribution of raw dairy materials including milk and butter. For example, all foreign imports of raw butter were obtained directly by the government, which then redistributed allotments of butter to the various dairy companies. In addition, Iran set up new labor laws, which *inter alia* established Worker's Islamic Councils. A Council for a particular company was elected by the company's employees and had an ambiguous role to play in influencing corporate

policies and decisions regarding working conditions and pay. All of these new laws and policies were in place by the middle of 1979, and continued to apply through April of 1982.

In November of 1979, Americans at the United States Embassy in Tehran were taken hostage and shortly thereafter, Iran was subjected to an international trading embargo. However, after the release of the hostages in January of 1981, most nations lifted the economic embargo, the notable exception being the United States. All the economic data in 1981-82 indicates a relatively quick return to normalization of international trade. In particular, Japan, West Germany and Holland engaged in substantial trade with Iran. However, Iran's international trade overall was still lower in 1982 than it had been prior to the Revolution.

On September 22, 1980, Iraq commenced a war against Iran (the "Iran-Iraq war") by a surprise attack on Iran's south-western border. Initially, Iraq was successful, seizing Iranian territory along the border that included several important oil fields. During 1981, the war was largely or solely fought in Iranian territory. However, around the start of 1982, the tide turned and Iraqi ground forces were driven from much of the territory they had occupied, including the oil fields. Iraqi retreat from Iran was substantially complete by April of 1982.

On the first day of the war, Iraq bombed several military bases and airfields in Iran, including the Tehran Marahab Airport which was situated on property adjacent to Pak Dairy. In October, Iraq bombed several oil refineries. The bombing campaign proved, however, to be a failure overall. Several bombs did not go off; others missed their targets. The Tehran Airport specifically suffered slight damage to its runway, which was repaired quickly.

After these early attacks, bombing in Iran was minimal. There was no bombing of Tehran at all in 1981 or 1982. However, sorties and bombing runs were made on cities a few hundred miles to the southwest (i.e. near the border between Iran and Iraq where the ground fighting was taking place). Further, Iraqi jets were occasionally seen making flights over Tehran.[3]

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[3] The Court bases its conclusions in part on the testimony of Plaintiffs' expert on Iranian history, Shaul Bakhash ("Bakhash") and Iran's submission of Iranian newspaper articles in response. At trial, Defendant objected to the testimony of Bakhash on the grounds that he had not previously been disclosed as an expert witness which Plaintiffs would call. Plaintiffs argued that his testimony was offered only to rebut the testimony of Dadyar which suggested that bombings occurred in Tehran in 1981 and 1982. The Court allowed the testimony of Bakhash provisionally, subject to a later determination as to its propriety after a briefing by the parties. It also allowed Defendant to supplement the record with relevant Iranian newspaper articles.

The Court now finds that Bakhash's testimony regarding bombing should be admitted. Defendant argued that Bakhash could not testify to historical events because he had not witnessed them personally. However, a historical expert may testify regarding historical facts within his field of expertise. *See, e.g., Denson v. Stack*, 997 F.2d 1356, 1363 (11th Cir.1993) (Clark, J., dissenting); *Laipenieks v. I.N.S.*, 750 F.2d 1427, 1428 (9th Cir.1985); *Houston v. Lafayette County*, 20 F.Supp.2d 996, 1003 n. 5 (N.D.Miss.1998); *U.S. v. Ciurinskas*, 976 F.Supp. 1167, 1170 (N.D.Ind.1997), *aff'd*, 148 F.3d 729 (7th Cir.1998). Here, Plaintiffs established Bakhash as an expert in modern Iranian history. Indeed, one of the books which Bakhash has authored, *The Reign of the Ayatollahs*, was relied upon by Defendant's expert in developing his valuation. Accordingly, Defendant's argument is rejected.

Defendant also claims that Plaintiffs did not timely disclose Bakhash as a testifying expert or his expected testimony in compliance with Fed.R.Civ.P. 26(a)(2), which requires disclosure of expert testimony within the time set by the Court. However, late disclosure of an expert may be excused where there is a showing of "substantial

Inflation was a serious problem for Iran both before and after the Revolution, running about 20% between 1977 and 1982. In the dairy industry specifically, inflation rates were 14% in 1978, 15% in 1979, 18% in 1980 and 24% in 1981.[4] High

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justification" for the lateness. Here, plaintiffs have made such a showing. First, the need for the testimony on bombing and missile attacks only became apparent after Dadyar's testimony at trial as Dadyar had not made allegations regarding bombing in Tehran previously and Defendant's expert Richman had testified in deposition that he did not rely on allegations of bombing in making his valuation. Second, the Bakhash testimony was proper rebuttal, directly addressing and impeaching the Dadyar's testimony by asserting that no bombings had occurred in Tehran in 1981 or 1982. Third, Plaintiffs' lack of access to persons who witnessed events in Tehran during 1981 and their resulting reliance on historical expert testimony is in part a result of Iran's refusal, in direct violation to two of this Court's orders, to allow Reilly into Iran to examine Pak Dairy and interview its personnel. Iran asserted a sovereign interest in controlling who crossed its borders, but allowed its own American valuation expert to enter Iran and have access to Pak Dairy's facilities and personnel. The prejudice to Plaintiffs as a result of this discriminatory restriction further supports the fairness of allowing the Bakhash testimony on a limited factual issue raised by the Defendant for the first time in its case in chief. Finally, to enable Iran to respond to the testimony, the Court provided Iran, at its request, time to gather and submit evidence of Iranian newspaper articles relating to bombing attacks in Tehran. The Court finds that Defendant was adequately able to respond to Bakhash and support its own position through this measure. Accordingly, both the testimony of Bakhash on bombings and the newspaper articles translated by Dr. Vafai and submitted by Iran will be allowed into evidence.

[4]These are the rates for Iranian years 1357-1360. The Iranian calendar year begins in March of the Gregorian calendar. Thus, Iranian year 1357 extended from March 22, 1978 to March 21, 1979. The Court will follow the convention of referring to Iranian years using the Gregorian year in which it starts. Thus, Iranian year 1357 is equated to Gregorian year 1978, 1358 to 1979, 1359 to 1980, 1360 to 1981.

inflation prior to the Revolution was a result primarily of excessive growth in certain sectors of the economy and an imbalance between supply and demand. After the Revolution, it continued in part due to the embargo and the Iran-Iraq war.

C. Pak Dairy

In 1959, a group of private Iranian citizens asked McKesson, a Maryland corporation (then operating under the name Foremost-McKesson, Inc.), to join them in establishing a dairy business in Tehran, Iran. McKesson agreed to provide half of the required capital, all management and personnel, procurement services, ingredients and packaging. A joint venture agreement was executed and, through a separate agreement, McKesson agreed to provide technical assistance, licensed its trademark and provided procurement and engineering capability.

Pak Dairy was incorporated and formally registered as an Iranian private joint stock company on March 12, 1960. From 1960 until 1979, McKesson provided the company's top management. Until October 1981, McKesson representatives sat on the Board of Directors of Pak Dairy. Although McKesson initially owned a 50% interest in the company, by 1978 it had reduced that interest to 31 percent.

Frank Fisher ("Fisher") was the managing director of Pak Dairy from shortly after its founding until November of 1979, when he left Iran to return permanently to the United States. As managing director, Fisher had performed duties equivalent to a chief executive officer of a corporation. In October of 1980, Mohamad Khabiri ("Khabiri") was elected Managing Director by the Board and held the position through the date of expropriation.

Pak Dairy's operations occurred at two plants located in Tehran: a main dairy plant at Old Karaj Road on land immediately adjacent to the Tehran Airport, and an ice cream production plant known as Canada Frost approximately a quarter mile away. Principle products at the main facility included fluid milk in white, chocolate and strawberry flavors, a heavy breakfast cream, butter, yogurt and cottage cheese. At the ice cream facility, Pak Dairy made a variety of ice cream products in various flavors.

Pak Dairy did not produce its own raw milk or raw butter. The company obtained 17% of its daily supply of fresh milk from a dairy herd company called Sepahan, in which Pak Dairy had approximately a 20% ownership interest. The remainder came from contracts with government-run dairies. Pak Dairy purchased butter in frozen blocks on the international market. Because storage room at the plant was insufficient to contain all of its frozen butter, Pak Dairy stored most of its supply in cold storage warehouses downtown and would bring a block to the main dairy plant as needed for processing and repackaging into butter packs wrapped in foil. As with butter, the foil and other packaging materials were also purchased on the international market.

Between the two plants, Pak Dairy was capable by 1978 of producing 175 tons of milk, 60 tons of butter and 60 tons of ice cream per day. By the end of 1966, Pak Dairy's operations were profitable and remained so every year thereafter through 1982.

D. Procedural History

McKesson commenced the instant action on January 22, 1982 alleging that Iran, acting through its agents, had *inter alia* illegally withheld dividends issued by Pak Dairy in 1979 and

1980 and that as a result of this and other interferences with its property rights, McKesson's equity interest had been effectively expropriated as of May 27, 1980. Pursuant to Executive Order No. 12294, 46 Fed.Reg. 14111 (1981), this Court stayed the action pending an adjudication of McKesson's claims by the Iran-U.S. Claims Tribunal ("the Tribunal") in The Hague.

On April 10, 1986, the Tribunal issued a ruling. *See Foremost-Tehran, Inc. v. Government of the Islamic Republic of Iran,* Award No. 220-37/231-1 (*filed* April 11, 1986), *reprinted at* 10 Iran-U.S. Cl. Trib. Rep. 229 (1987). It found that the 1979 and 1980 dividends had been illegally withheld from McKesson and that Iran was responsible for the nonpayment. *Id.* at 252. It therefore ordered Iran to pay McKesson an amount equal to the dollar value of the two dividends plus interest. *Id.*

However, the Tribunal also found that Iran's "creeping" interference with McKesson's property rights did not, by January 19, 1981, ripen into the sort of "irreversible deprivation" of property which amounts to a de facto expropriation. *Id.* at 249-50. Because a claim must have been "outstanding" on January 19, 1981 to fall within the Tribunal's jurisdiction, *see Foremost-McKesson, Inc. v. Iran,* 905 F.2d 438, 441 (D.C.Cir.1990); *Foremost Tehran, Inc.*, 10 Iran-U.S. Cl. Trib. Rep. at 233 n. 5, the Tribunal did not consider whether the property was expropriated subsequent to that date.

Plaintiffs then revived this action on April 1, 1988 by filing a motion for partial summary judgment on liability, alleging that Iran's conduct subsequent to January 19, 1981 when viewed in addition to Iran's earlier conduct did constitute a legal expropriation after the Tribunal's jurisdictional cut-off

date.[5] The Court subsequently found as a matter of law that Iran had illegally withheld from McKesson its share of the dividends issued in April of 1981 and 1982, and that by April 1982, Iran's interference with McKesson's property rights amounted to an expropriation.

E. Summary of the opposing valuations of McKesson's equity interest in Pak Dairy

Both Plaintiffs and Iran put on a valuation expert who testified as to the fair market value of McKesson's 31% interest in Pak Dairy at the time of the taking. The experts defined "fair market value" somewhat differently, however. Iran's expert, Richman, viewed the relevant fair market value as that price which would be paid for the 31% interest by a willing buyer to a willing seller. Plaintiffs' expert, Reilly, testified that he calculated the value as the price between a willing buyer and a less-than-willing seller. For all aspects of their calculations save one, the application of a lack of marketability discount (see below), this distinction did not make a difference in the methods by which each calculated value.

Plaintiffs' valuation expert, Reilly, used two methods of valuation: (1) the discounted cash flow ("DCF") method and (2) the direct capitalization ("DCAP") method. Both methods measured the value of Pak Dairy as a going concern by converting a projection of future income into an equivalent April 1982 present value. However, the DCAP method projects income only one year into the future based on a historical annual

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[5] In accordance with Executive Order 12294, "those claims not within the jurisdiction of the Claims Tribunal will 'revive' and become judicially enforceable in United States courts." *See Dames & Moore v. Regan*, 453 U.S. 654, 684-85, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).

income average and assumes that the company will have steady growth rate in perpetuity. The DCF method forecasts income a number of years into the future based on factors or assumptions that may not reflect historical patterns and does not assume that each future year will have the same amount of growth.

For each method, Reilly made two calculations of value. In one calculation, he adjusted the value of the company upward to account for the potential income of certain Pak Dairy projects (hereinafter the "New Projects") which had been planned but not yet fully implemented by the valuation date. In the second calculation, Reilly determined the value of the company ignoring any potential income from the New Projects. Using the DCF method, he calculated the value of Pak Dairy with the New Projects to be $88.4 million. Using the DCAP method, he calculated the value of Pak Dairy with the New Projects to be $68.4 million. Because he found these two methods equally reliable, he concluded that the value of the entire company with the New Projects was the average of these two figures, $78.4 million, and that the value of McKesson's 31% interest was $24.3 million.

He then calculated the value of Pak Dairy without the New Projects using both methods. Using the DCF method, he calculated the value to be $56.2 million. Using the DCAP method, he calculated the value to be $55.7 million. Again averaging the two values, he concluded that the value of Pak Dairy without the New Projects was $55.95 million, and that McKesson's 31% interest was equal to $17.4 million.

Richman rejected the DCF method as overly speculative, and applied only the DCAP method. He found that no adjustment should be made for the potential income of the New Projects. Using the DCAP method, he determined the value of

Pak Dairy to be $7,302,835. He then applied a 10% lack of marketability discount, and took a further discount of 35% for McKesson's minority status. His final valuation of McKesson's 31% interest was approximately $1.3 million. In contrast, Reilly took no lack of marketability discount, testifying that one was not appropriate in a forced-sale situation. He also took no minority discount, testifying that his valuation was already performed on a minority basis.

Both Plaintiffs and Iran introduced evidence in support of their respective valuations which was only available after the valuation date. However, under the "known or knowable" rule, a retrospective appraisal (where the effective date of the appraisal is prior to the date of the appraisal report) should be based on information which would have been known or knowable by an investor at that time. The sole appropriate use of information available only after the valuation date would be to establish by inference the existence of a fact that would be known to an investor prior to that date. Accordingly, in connection with the valuation of Pak Dairy, the Court considers only the facts that would be known or knowable by April of 1982.

Overall, the Court finds that of the two experts, Reilly was more qualified and experienced. Although both experts had spent years engaging in valuations of small companies, Reilly had a superior background in valuing corporations in foreign countries in general and Iran in particular. Richman stated that he had never performed a valuation analysis on a foreign corporation, let alone one in Iran. Reilly by comparison has valued numerous international business, and in particular had valued six to eight companies in Iran that had been expropriated, testifying six times before the Tribunal in support of his opinions. Richman's general knowledge of Iran stemmed from a relatively brief list of sources, compared with the

"banker's boxes" of Iranian data with which Reilly was familiar. Nevertheless, the Court finds that Richman was a competent appraiser whose opinions deserve to be weighed carefully against Reilly's in light of all the evidence.[6]

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[6] Although Richman's essential competency was evident at trial, his credibility was somewhat undermined. His representations regarding his qualifications as an appraisal expert were shown under cross- examination to be inaccurate in two respects. In addition, Richman conceded that in performing his valuation, he had violated ethics rules established in the Uniform Standards of Professional Appraisal Practice ("USPAP"). USPAP is promulgated by the Appraisal Foundation, a quasi-government agency created by Congress to regulate appraisers in the United States. Certain appraisal organizations require their members to follow these rules, and compliance with USPAP is necessary when the appraisal is being performed for a federal agency. Although Richman was not a member of any organization requiring compliance with USPAP and thus was not bound in this case to follow its rules, the Court finds USPAP persuasive evidence of appropriate appraisal ethics and practices. USPAP ethics rules prohibit an appraiser from accepting an assignment which includes the reporting of predetermined opinions. In this case, Richman was asked by Iran to do a preliminary appraisal of Plaintiffs' interest prior to being retained, and he came back with an assessment that the interest "may have been valueless" as of April 1982. Tr. 2/15/00 p.m. at 71. After being retained, Richman continued to pursue this value, asserting in a written request to Iran for relevant data that "it is most important for my investigation and report to show that there was no market, no investors, and no sales of Pak Dairy during the years 1980 through 1985." Tr. 2/15/00 p.m. at 73. This approach is not consistent with USPAP's ethics rule and suggests an inappropriate bias in Richman's appraisal methods. A further concern is that Richman conceded that he had destroyed his preliminary notes because "[h]e knew there was going to be a subpoena coming." Tr. 2/15/00 p.m. at 78, 80. While it is not clear that this violates USPAP, which only requires maintenance of documents which are "necessary" to the valuation opinion, Richman's desire to conceal the contents of these material documents from the Plaintiffs implies that there was information in them which would be contrary to his stated opinions. Although these problems undermine Richman's credibility, the Court does not consider them sufficient to reject his opinions out of

F. Direct Capitalization Method

The DCAP method is one of the income-based methods of valuation, which are used to value a company as a going concern by converting a projection of the company's future profits into an equivalent equity value. Both experts relied on this method to value Pak Dairy. Under the DCAP method, the valuator first calculates the historical average annual cash flow over a period of years approximating one business cycle and then, based on that average and the company's long term growth rate, projects income one year into the future. This projected or "normalized" income is what will be converted into equity value or "capitalized." The projected income is obtained by multiplying the average historical net cash flow by (1 + G) where G is the estimated long term growth rate of the company. The value of the company is then equal to the projected income divided by the "capitalization rate." The capitalization rate in turn is equal to the "present value discount rate" minus the long term growth rate. In sum, the overall DCAP formula is as follows:

$$Value = \frac{C\,(1+G)}{D-G}$$

Where C = Historical Average Annual Net Cash Flow
G = Long Term Growth Rate
D = Present Value Discount Rate

The key factors to be determined are thus the long term growth rate, the average historical net cash flow, and the present value discount rate.

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hand. Rather, as stated previously, his opinions were carefully considered in light of the reasons and evidence offered to support them and weighed against the reasonableness of Reilly's contrary views.

1. Long Term Growth Rate

The long term growth rate is that rate of growth expected to continue in perpetuity. Reilly estimated the long term growth rate to be twenty (20) percent. In highly significant contrast, Richman estimated the growth rate to be zero (0) percent.

In arriving at a growth rate of 20%, Reilly estimated the long term growth in real value at 15% and, because he calculated his other values with inflation built in, added 5% to account for expected growth in prices due to inflation. The Court finds that the 5% inflationary component of growth is appropriate but that the prediction of 15% long term real growth is excessive.

Reilly based his prediction of real growth primarily on two factors: first, a 1978 report, prepared by Carpenter based on projections provided by Pak Dairy's management, forecasting 15% growth in sales of Pak Dairy's existing products each year from 1978 through 1982; second, a substantial increase in population subsequent to the 1978 projection.

The 1978 report prepared by Carpenter in turn made its projections based on a number of factors. First, in the preceding relatively low-inflation years, Pak Dairy had experienced steady and very significant growth in product sales, from approximately $13 million in 1973 to $31 million in 1976. Further, trends within the dairy market in Iran indicated that this growth would continue. The report also predicted continuing economic growth in Iran's economy overall based in part on a combination of political stability, favorable government attitude towards private enterprise, a favorable environment for foreign investment and an expectation of government growth-oriented

expenditures in its next five-year economic plan (the Sixth plan adopted by the Shah).

All of these assumptions soon turned out to be incorrect, as the Iranian Revolution took place shortly after Carpenter issued his report, leading to an Islamic regime with strong socialist characteristics and a hostility to Western culture, management style and investment. The Sixth Plan was of course never adopted, and the Iran-Iraq war, another unforeseen development, added to the economic disruption and the drain on Iran's resources. However, although the impact of these unforeseen events was dramatic in 1980, the effect had significantly although not entirely diminished by April of 1982.

For example, contrary to Carpenter's prediction, total gross domestic product for Iran dropped considerably between 1979 and 1981. However, this loss was almost entirely due to the drop in oil revenues that resulted from Iraq's seizure of Iran's south-western oil fields early in the Iran-Iraq war. By April of 1982, Iraq had been largely pushed out of Iran and Iran's oil fields had been reclaimed. The effect of Iran's battle victories was noted in a March 1982 report by the Tehran Stock Exchange:

> The beginning of the year 1982 coincided with the brilliant victory of the Iranian army in the war fronts against the aggressor, Iraq, which, in itself, paved the way for reconstruction and revival of the country's economy. The increase of the public confidence in the banking system, the considerable growth of the private sector's savings with the banking system and *rapid increase of oil export during this year*, were amongst the significant consequences of these victories.

Pl.Ex. 51 at IR670 (emphasis added). This turnaround, coming after the end of the international trade embargo in early 1981 and the return of substantial amounts of foreign trade thereafter supports the conclusion that, as of 1982, real growth in Iran's economy could be reasonably expected notwithstanding the new socialist regime and the ongoing war. Indeed, the agricultural sector, which is the sector in which Pak Dairy operated, not only grew every year between 1977 through 1981 notwithstanding the war and the new regime but had its highest rate of growth in 1981. Further, in that year, new investment in most forms of business rose from $18,152,000 in 1980-81[7] to $29,728,000 in 1981-82, a real increase in investment of roughly 30 percent. Thus, as of April of 1982, real growth could reasonably be expected in the economy overall and the agricultural sector in particular.

As with Iran as a whole, Pak Dairy faced difficulties which Carpenter had not foreseen. The war with Iraq, while not inflicting any direct damage on Pak Dairy's operations, nevertheless impacted on it in several ways. In 1981, Pak Dairy had made a substantial financial contribution to the war effort. It also contributed food, refrigerated trucks (used in the war for the purposes of transporting the dead), payments to the relatives of martyrs and payments to employees serving in the military for the difference between their military salary and their civilian salary. In addition, the war caused labor shortages, resulting in a decrease in Pak Dairy's workers from 743 in December of 1980 to 707 by the end of 1981. Given that the war was ongoing in April of 1982, it is reasonable to expect that Pak

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[7] This corresponds to the Iranian year 1360, which extended from March 1980 to March 1981.

Dairy would continue to provide some form of resource for the war-effort and be limited in its ability to obtain new labor. However, as the trend in the war in April of 1982 was dramatically in Iran's favor, a reasonable investor would expect such collateral expenses from the war to decrease in the future.

Pak Dairy's problems also included shortages of raw materials such as liquid milk, butter and spare parts and an underutilization of capacity due to these shortages. Supply of raw milk was a critical problem for Pak Dairy, as the amount declined in 1981 from around 120 tons per day to only 75 tons per day, less than half the company's production capacity. This reduction followed a threat in 1980 from the Iran Milk Industries Company ("IMIC"), an Iranian instrumentality responsible for the payment of government milk subsidies. IMIC warned Pak Dairy to reduce its milk purchases to no more than 100 tons or else forfeit milk subsidies for any milk over that amount. IMIC indicated that the reduction was necessary because of a general shortage and the need to equitably distribute the available supply. However, in light of the fact that total milk production in Iran rose in both 1980 and 1981, and considering the Board's confidence in early 1982 that they would receive a "fair" distribution of this supply by the beginning of 1983, it is reasonable to expect that Pak Dairy's allotted supply of milk would grow. The Managing Director actually predicted in February of 1982 that the company would later in the year be able to obtain raw materials necessary to maximize production, and Dadyar testified that milk supply in 1982 had already risen to 80 tons per day, a 7% increase over 1981. In addition to the increasing milk supply, shortages in other areas were also being addressed. The Board of Directors noted on April 4, 1982 that it had succeeded in obtaining 25 million rials worth of spare parts for its production machines. The Court finds that as of the valuation date, a reasonable investor would conclude that Pak Dairy's supply shortage

problems would continue to improve after the valuation date.

Price controls imposed by the government represented another hindrance to new growth, as they constrained Pak Dairy's ability to respond to rising costs. Carpenter noted that such controls operating before the Revolution "had seriously reduced business profits and created a significant uncertainty in business circles." Pl.Ex. 4 at MC 8623. He predicted that the new government put in place by the Shah in 1976 would begin modifying the price control policy to allow reasonable price increases and generally speaking take a more favorable approach to business. This prediction proved unreliable after the Shah's "new government" was removed and replaced by an Islamic regime which maintained strict price controls during the high-inflation years after the Revolution. Although Pak Dairy had success in those days in obtaining permission to increase prices as needed, it is likely that the effects which Carpenter noted in 1978, which he assumed would diminish under a more business- favorable regime, would at least continue under the socialist post-Revolution regime. However, the price control system existed before the Revolution, yet from 1973 to 1977, Pak Dairy's sales grew at a compound growth rate of 22.1% a year.

The overall impact of these problems can best been judged by Pak Dairy's actual revenue results in 1980 and 1981. Although in 1980, Pak Dairy's revenues dropped more than 65% from the previous year before adjusting for inflation, the company returned in 1981 to its historic pattern of real growth. Overall, its net profit before taxes increased from 134 million rials in 1980 to 178 million rials, roughly 33% or approximately 9% after adjusting for inflation in the dairy market. This improvement could reasonably be expected to continue in 1982 because of the improvements in both the Iranian economy and the dairy industry and because of reasonably expected increases

in supplies.

The population statistics relied upon by Mr. Reilly add further support to the conclusion that Pak Dairy would continue to experience real growth after April 1982. In Iran overall, population significantly expanded every year between 1976 and 1982, from 33.7 million in 1977 to 40.8 million in 1982, a 21% overall increase. The rate of increase was even higher in Tehran because the Iranian Revolution precipitated an acceleration of migration from rural to urban areas. Between 1978 and 1980, the population of downtown Tehran alone (ignoring the suburbs of Tehran) increased from 4 million to 6 million, a fifty percent increase in population in three years or less. That was particularly significant for Pak Dairy because Tehran was its principle market and Pak Dairy controlled about a third of the milk market in that city. There is a strong correlation generally between population and the consumption of dairy products. The correlation would be particular strong here for two reasons. First, the population increase was disproportionately made up of younger persons, ranging from zero to ten years, when persons are drinking more milk than at later years. Second, the Middle-eastern diet involved consumption of dairy products to a greater degree than the American diet.

Although this correlation had not appeared by 1982 due to other factors such as limitation of supply, it supports the conclusion that as supply and the overall economy improved, growth would closely follow. It also provides an additional reason to believe that the Iranian government would take steps to improve milk supply, given the increased demand and the Iranian government's concern on ensuring that the basic needs of its people would be met. The government's expressed position that increasing the production of dairy products was one of its "top priorities" was noted by the Board in early 1982.

Viewing the existing external difficulties of Pak Dairy, many stemming from either the socialist character of the Iranian government and the ongoing war with Iraq, as well as the specific difficulties of Pak Dairy and taking into account the positive developments both in Iran and the company specifically, the Court finds that the record supports a long term real growth forecast of 10% and that the overall long term growth rate, including a component for inflation, is therefore 15 percent.

2. Net Cash Flow

In calculating average net cash flow, a valuator looks to the actual historical annual profits of the company. However, the valuator must also be satisfied that the historical cash flow is representative of future cash flow and if it is not representative, adjustments to the historical numbers must be made. For example, where historical net income is reduced by unexpected and non-recurring expenses, adding back those expenses to income is appropriate in calculating an accurate and representative average net cash flow.

As an appropriate historical period approximating one business cycle, both experts in this case looked at Pak Dairy's net cash flow during the five-year period 1977-1981. To determine cash flow for each of these years, both experts looked to the company's audited financial statements. However, they disagreed regarding three aspects of the calculation. First, they disagreed slightly on the foreign exchange rate to apply to the figures in the financial statements. Second, they differed in whether to calculate net cash flow on a pre-tax or after-tax basis. Reilly calculated the average net cash flow on a pre-tax basis, whereas Richman calculated the after-tax average. Finally, in Reilly's calculation, he found that adjustments to the historical cash flow were appropriate, because of non-recurring expenses and because the historical income did not reflect the

profit-earning potential of the New Projects. Richman found that no adjustments should be made.

a. Official Exchange Rates

The figures in the audited financial statements were in rials, the Iranian currency. In calculating their historical average net cash flow, both experts converted the figures in the financial statements to U.S. dollars at the official exchange rate. However, they determined that rate using different sources. Richman used the official exchange rates as published by Bank Markazi, the Central Bank of Iran while Reilly converted the figures to U.S. dollars using the rial-to-dollar exchange rates published by the World Bank.

The World Bank's publication of exchange rates for Iranian rials is based on a calculation of the average exchange rate used by Iran in its actual transactions with foreign entities using the International Monetary Fund ("IMF") as a clearinghouse. Because the World Bank published rate is the actual exchange rate that Iran used when it conducted business through the IMF, the Court accepts it as appropriate and sufficient evidence of the Iranian official exchange rate. As published by the World Bank, the average official exchange rate was 70.58 rials to the dollar ("rtd") in 1977; 70.48 rtd in 1978; 71.5 rtd in 1979; 71.57 rtd in 1980; 80.03 rtd in 1981; and 84.45 rtd in 1982.

b. Calculation Pre-Tax or After-Tax

Reilly testified that calculation of net cash flow could be made either on a pre-tax or after-tax basis, so long as all the factors in the DCAP formula were calculated on a consistent (pre-tax or after-tax) basis. Thus, he testified, if a pre-tax normalized income (the numerator in the DCAP formula) is

divided by a pre-tax capitalization rate (the denominator), the resulting value is the same as it would be if both numerator and denominator were calculated on an after-tax basis. Reilly testified that he did in fact calculate the factors in both numerator and denominator on a consistent pre-tax basis.

Richman testified that he calculated net cash flow on an after-tax basis in part because it was required by the data source on which he relied to calculate his present value discount rate. Richman read an excerpt from this source, the 1999 Ibbotson Report, which suggests that its equity data (whose specific role in the present value discount rate is discussed in greater detail below) are calculated on an after-tax basis and should only be used on after-tax cash flows. However, although Reilly also relied in his valuation on data from an Ibbotson study, the specific study was Ibbotson's 1981 Yearbook, not the 1999 Report. Further, in requiring after-tax cash flow for an after-tax rate of return data, Ibbotson implicitly acknowledged the alternative of using a pre- tax cash flow for a pre-tax premium. The Court finds that Reilly appropriately calculated net cash flow on a pre-tax basis.[8]

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[8] During Plaintiffs' rebuttal case, Reilly testified to the existence of several texts which supported the use of a pre-tax analysis. Plaintiffs asserted that the testimony was to rebut Richman, who allegedly testified directly or indirectly that there were no published sources supporting such a conclusion. Defendant disputed that Richman had ever given such testimony. The Court allowed Reilly's testimony in conditionally, subject to a later determination of whether it was proper.

Plaintiffs subsequently filed a brief, pointing to testimony from Richman that Ibbotson required use of after-tax income. He also testified, later, that "all of the people who do valuations rely on [Ibbotson]." Transcript. 2/15/00 a.m. at 53. The Court finds that this does not amount to an assertion that there are no published sources supporting after-tax analysis. Therefore, Reilly's reference to such sources is stricken and the Court has accordingly not considered it.

c. Adjustments

Without making any adjustment for the New Projects, Reilly determined that the average net pre-tax cash flow between 1977 and 1981 was $2,967,000. In calculating this average, Reilly adjusted the 1981 net income figure by adding back a single non-recurring expense, a $500,000 voluntary contribution to the war effort. The Court finds that the contribution was appropriately treated as a non-recurring expense and therefore accepts $2,967,000 as the average annual net pre-tax cash flow without taking the potential income of the New Projects into account.

Reilly testified that the income figures for years 1979 through 1981 should also be adjusted to reflect the earning potential of three New Projects. Specifically, he added $320,000 to the net income for 1979, $1,116,000 to 1980 and $1,734,000 to 1981. Taken together, these further adjustments due to the New Projects increased Reilly's calculated average historical net income by $634,000.

These adjustments were based on projections of income from the New Projects made by Carpenter in 1978. Carpenter had joined McKesson in 1964 as a financial analyst and in this capacity, he worked with approximately 25 overseas companies in which McKesson had an equity interest and routinely reviewed their financial statements and audit reports. Beginning in 1973 or 1974, Carpenter was the planning manager for McKesson's overseas investments, which required him to analyze new opportunities to invest in business overseas and to increase the profitability of then existing operations. While employed by McKesson, Carpenter visited Pak Dairy between 15 and 20 times, with his first visit in 1970 and the last in 1978. Each time he was in Iran, Carpenter attended Pak Dairy Board

of Director meetings if they were in session and he attended Pak Dairy Board of Directors meetings held at the McKesson offices in San Francisco, California once each year until 1979. As a result of his job responsibilities for McKesson, Carpenter worked closely with Pak Dairy management to develop an overall financial program based on their production capability, sales capabilities and financial requirements and to develop presentations based on their data.

Before the Revolution, Carpenter helped develop an expansion plan involving an outlay by Pak Dairy of $7.4 million for three projects. Four million dollars was allocated for a project to commence the production and sale of infant food. Two million dollars was proposed for an increase in Pak Dairy's cold storage facilities, which would enable it to store frozen butter on-site. The increased on-site storage space would enable Pak Dairy to perform more efficiently by eliminating the need to transport butter from the storage space rented downtown. Finally, Carpenter proposed $1.4 million for a third project, a further investment in Sepahan to increase the size of its dairy herd and thus increase the amount of raw milk available to Pak Dairy.

In 1978, Carpenter submitted a proposal to McKesson that it invest $1.24 million as its share of the cost of these New Projects. The proposal made specific income projections for the first three years for the infant food project and for all three projects together. Projections were based on the information obtained from Pak Dairy's financial records and sales and on earning projections from the sales manager and managing director. Subsequently, McKesson approved the $1.24 million expenditure.

The largest of the three projects was the infant food project, which involved a plan to produce, sell and distribute

two forms of baby food, an infant milk formula and a cereal formula, the base of which was dried milk powder. At the time of the proposal, there was no current in-country production of either product. Among those importing baby food was Gervais-Danone of France ("Gervais"), which held approximately 28% of the baby food market. The Gervais product had an established distribution system through local pharmacies and was accepted by consumers as a quality brand name. Prior to June of 1978, Pak Dairy negotiated an agreement with Gervais to produce baby food under the Gervais product name and through its distribution system. The agreement was for an initial period of 10 years with automatic renewal periods of 5 years.

To add this product to Pak Dairy's line and begin production and sales, a number of significant steps were required. By the date of expropriation, following a discussion of the merits of the Project by Pak Dairy's board of directors, Pak Dairy had in fact taken most of the necessary steps. The principal piece of equipment Pak Dairy needed was a "spray dryer," which turned liquid milk into dry milk, the principal ingredient in the infant food formula. By the end of 1978, a spray dryer had been purchased for approximately $1,000,000 from a United States company and installed at the main Pak Dairy facility and was fully operational.[9] In addition, after making a preliminary feasibility study, Pak Dairy constructed a factory for producing the infant food in the northern section of

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[9] Carpenter's 1978 report to McKesson noted that the spray dryer had been purchased previously to enable Pak Dairy to save excess skim provided from the government dairies by converting it to powdered milk, but that since the government now had its own dryer by 1978, Carpenter expected that Pak Dairy's would thereafter be used for baby food.

its main plaint at a cost of 25 million rials (roughly $300,000 at official exchange rates).

A government license was also required to produce the new product. Prior to the Revolution, Pak Dairy applied for and obtained a license from Iran which gave them the exclusive right to produce baby food under an existing import label. Other imports of baby food would be restricted so long as Pak Dairy met the local demand.

By December of 1978, the only thing Pak Dairy needed to begin actual production and distribution of baby food was packaging equipment, which cost only $35,000 and was commercially available on the market in Europe. However, implementation of the baby food project was halted during the international embargo. In response to the lifting of the embargo in 1981, and at the direction of the Board, Pak Dairy management renewed consideration of whether to begin infant food production. In August of 1981, the Managing Director stated in a report to the Board:

> since some of the problems have been resolved and there is a possibility for the implementation of the plan for production of children's food and there is a need in the country for such products for the children, and in order to avoid the company's loss due to previous investment in this project, the board of directors is requested to provide its opinion as to whether we should contact Dipal Company and re-visit the possibility of implementing and completing such plan.

Pl.Ex. 12. In response, the Board was still hopeful of implementing the project, and intended to do so after the

submission of another "feasibility study" to the Ministry of Industries and Mines and receipt of its opinion. By April of 1982, Pak Dairy had not made a final decision to begin infant food production.

Pak Dairy had also at that time not made the additional investment in Sepahan, nor had it built a new cold storage facility. It had identified a piece of land referred toas the Tanker land, which was situated immediately adjacent to the Pak Dairy main factory and could serve as a site for new storage. Further, in April of 1981, the Board of Directors approved the purchase of the land in principle for this purpose. However, the land's owner rejected certain terms of the offer. Around May 16, 1981, the Managing Director had revised the offer and submitted a new request to the Board of Directors, but the Board had not re-approved the purchase by April of 1982.

The Court concludes that neither the proposed storage facility nor the possibility of an increased supply of milk resulting from the proposed Sepahan investment support any adjustment to income. However, based on the substantial investment that had been made in the baby food project, the relatively small investment that was needed to complete the project, the exclusive license obtained from the government, the distribution agreement and the accompanying access to an established label and system of distribution, the problems that had reportedly been solved, the statements of the Managing Director and the Board pursuing an interest in the project up to the time of valuation, the recognized need and demand for the infant food product and the specific baby food income projections made by knowledgeable employees at Pak Dairy in 1978, the Court finds that an investor would consider the potential income of the infant food project to be a valuable intangible asset. Simply put, a reasonable investor would value the company with the potential described above more highly

than the same company without such potential. The Court also finds that the 1978 projections of income are a reasonable starting point for estimating an appropriate adjustment to income to reflect the value of the baby food potential.

However, 1978 specific income projections cannot be considered representative of the value of potential income absent a substantial discount. First, only 91% of the income projections were based on the baby food project. Nine percent of the income adjustment is thus deducted for this reason. The resulting baby food income must be further discounted significantly to account for its uncertainty. The 1978 projections were based on a number of assumptions that proved by 1982 to be highly inaccurate. The projects could not be assumed to be as successful under the new regime and in the context of war as they would be otherwise, particularly considering that in April of 1982, Pak Dairy was suffering limitations on its supply of liquid milk, the necessary raw material for the production of dry milk used in making baby food. Further, in 1982, there was still some doubt as to whether the baby food project could be implemented at all, although this doubt was small for the reasons discussed above.[10] In light of these problems and uncertainties, the Court finds it appropriate to discount the 1978 baby food projections by 80 percent. Accordingly, instead of an adjustment of $634,000, the Court finds that the average net cash flow should be adjusted upwards by $115,388. Given that the average net income without the infant food potential is $2,967,000, the net cash flow to be

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[10] Because the Court does not consider any evidence which was not known or knowable on the date of expropriation, it has not taken into account evidence in Defendant's Exhibit 81 that in 1983 the Board made a decision to implement the project.

normalized is thus $3,082,388.[11]

3. Present Value Discount Rate

The present value discount rate is the overall rate of return on capital that would be demanded by an investor, or the "cost of capital." Because the measure of income Reilly used in his cash flow calculations was Pak Dairy's income before debt service, Reilly's discount rate had to reflect the average rate of return for equity and debt. He therefore appropriately calculated both a rate of return for equity and a rate of return for debt and then calculated the weighted average rate of return to obtain his final present value discount rate.

Both experts calculated the equity rate of return using what is known as the build-up method, which first establishes a "risk-free" rate of return and then adds to that rate to take into account various sources of risk. These additional sources include the long-term equity risk (the added risk of equities over bonds), the small-stock equity risk (the additional risk of investing in small companies over large companies), and the company and country specific risk. (which address risk specific to Pak Dairy and Iran).

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[11] Iran argued both before and during trial that the New Projects are too speculative as a matter of law to be a valid consideration in assessing damages. However, it is established that the proof of the amount of damages need only be based on a "reasonable estimate." *Samaritan Inns, Inc.*, 114 F.3d at 1235. "Although a court will not permit a plaintiff to recover damages based on a 'mere speculation or guess,' the fact that an estimate is uncertain or inexact will not defeat recovery, once the fact of injury is shown." *Id.* (citations omitted). Because there is a basis for a reasonable estimate of the value to an investor of the infant food project's potential income, the Court maintains its position that the issue is properly one of fact.

a. Risk Free Rate

The "risk-free" rates used by the two experts were close, but not identical. Reilly used a 10% rate based on the rate of return for Iranian long-term bonds in the Iranian year 1358 (March 1979 to March 1980). Richman used a 10.95% rate based on long term U.S. Treasury bonds.

The "risk-free" rate of return is generally set at the rate of return on long term government bonds in the country where the business is located. Reilly chose the rate for a five-year Iranian bond. Although these long-term bonds were not literally risk-free, they are appropriately used as the basis of the "risk-free" rate because they are the closest thing to a risk free security that was available in Iran in early 1982. Defendant asserted that these bonds were not available in 1982, and that the payment of interest was in any case prohibited by law. However, while the payment of "interest" had become legally forbidden as contrary to Islamic law following the Revolution, banks and creditors continued to charge and receive interest by referring to it as "prizes," "bonuses" and "awards." In particular, payments of principal and interest on the five-year Iranian bond as well as substantial trading of the bonds continued through 1982. Accordingly, the Court accepts the 10% rate chosen by Reilly as the appropriate "risk free" rate of return.

b. Long-Term Equity Risk Rate and Small-Stock Equity Risk Rate

After determining the "risk-free" rate, the next component of risk to determine is the long-term equity risk rate. Reilly determined this to be 8.3 percent. This reflects the additional risk of equity securities or common stock over long term bonds. Because there was no Iranian data from which to

calculate the long-term equity risk rate, Reilly relied on data found in Ibbotson's 1981 Yearbook (hereinafter "Ibbotson") because the equivalent data was not available for Iranian stocks. Ibbotson documents the rates of return that large New York stock exchange companies paid investors for 1981, the last complete year before the valuation date. That rate was 8.3%, which the Court accepts as the appropriate long-term equity risk rate.

The next component of the present value discount rate is the small stock equity risk premium. This reflects the additional risk involved in investing in a small company such as Pak Dairy. There were no sources of Iranian data on small company risk premiums, so Reilly turned again to the data in Ibbotson. Ibbotson shows that the small stock equity risk premium was 6% in 1981, and the Court accepts that as the appropriate small stock equity risk premium in this case.

c. Company and Country Specific Risk

The last two components in calculating the present value discount rate are company specific risk and country specific risk.

The company specific risk premium is the additional premium resulting from the fact that Pak Dairy was riskier than the small publically traded companies on which the small-stock risk premium is based. The country-specific risk premium rate reflects the particular risks associated with investing in a company located in Iran. Reilly estimated that it would be 25% riskier to invest in Pak Dairy in Iran than in the companies represented by the small-stock risk premium. He accordingly calculated his combined company and country specific risk as equal to an additional 25% of the sum of his risk free rate, long term equity risk premium and small company equity risk premium, i.e. 25% of 24.3%, to arrive at a 6% additional

premium for company and country specific risk. Of this, he assigned 3% to company risk and 3% to country risk.

Richman also determined that the company risk premium should be 3% but made a judgment that an investor would demand a country-specific risk premium of 12 percent. Thus, he calculated his combined company and country specific risk premium to be 15 percent.

In the appraisal literature, the generally accepted range for the combined company and country specific risk premium is 0% to 10 percent. Given the situation in early 1982, Iran should be placed at the high end of this range. Risks generally taken into account in determining risk include expropriation, hyperinflation (which acts as a form of expropriation by devaluing the currency), and cross-border wars. All three risks were present on the valuation date. Given the Islamic and socialist character of the government, a respect for private property rights was far from assured.[12] Further, inflation was around 20% and the war with Iraq was ongoing, although the risk from war had dramatically diminished and the high inflation rate could also be expected to moderate given the end of the embargo and the rapid increase in oil exports. Accordingly, the Court finds that the country specific risk premium should be 6% and the combined company and country specific risk premium

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[12] In assessing the risk of expropriation, the Court does not take into account the historical fact of Iran's interference with McKesson's property, but rather the general risk of expropriation or property interference resulting from the overall character of the government. *See* Restatement § 712, Reporter's Note 3 ("When a taking arises out of a revolutionary situation that might affect the prospects of the enterprise in the eyes of a hypothetical purchaser, the situation should be taken into account in evaluating the property for purposes of compensation.").

equal to 9 percent. The total cost of equity or equity rate of return is thus 10% + 8 3% + 6% + 9% = 33.3 percent.

d. Cost of Debt

Reilly estimated the cost of Pak Dairy's debt based on the range of interest rates on commercial loans reported by Bank Markazi for early 1981. Such rates ranged from 8% to 12%, and Reilly assumed that Pak Dairy would be in the middle. Reilly concluded, and the Court so finds, that the average rate of return to holders of Pak Dairy's debt was therefore 10 percent.

e. Present Value Discount Rate

The final step in calculating the present value discount rate is to calculate Pak Dairy's mix of equity and debt capital, i.e. the weighted average cost of capital. Approximately 19.7% of Pak Dairy's capital consisted of debt with a 10 percent rate of return. The other 80.3% of Pak Dairy's capital was equity at the 33.3% rate. The weighted cost of capital is thus 28.7 percent. The Court finds that this is the appropriate present value discount rate to determine the value of Pak Dairy.

4. Overall DCAP calculation

Given an adjusted average net historical cash flow of $3,082,388 and a growth rate of 15%, the "normalized" income to be capitalized is $3,544,746.20. The capitalization rate is equal to the present value discount rate of 28.7% minus the growth rate of 15%, or 13.7 percent. The value of Pak Dairy calculated under the DCAP method is then equal to the normalized income divided by the capitalization rate, or $25,874,059.85.

This figure includes both the value of the equity in Pak Dairy and the value of its debt. To calculate the total value of the company's equity alone, it is necessary to subtract the value of the debt (approximately $3.637 million), yielding a total equity value of $22,237,059.85.

G. The Discounted Cash Flow Method

In addition to valuing Pak Dairy using the DCAP method, Reilly also valued the company using the DCF method, another income-based approach to valuing a going concern. Under the DCF method, Reilly calculated the value of the company as equal to the present value in April of 1982 of projected net income in the years 1982 through 1986 plus the discounted terminal value of the company in 1987.

To calculate projected net income in 1982-86, Reilly relied on sales projections found in a proposed 1982 budget presented by Khabiri as Managing Director to the Pak Dairy Board of Directors. The figures were prepared by personnel in the sales and production departments. In a Board meeting on April 12, 1982, the Board rejected the budget for three reasons: (1) "the planned budget does not reflect the real situation,"; (2) "the forecasts are not done correctly," and (3) the fiscal year of the company had been changed from one ending in December (as the proposed budget did) to one ending in September. Def. Ex. 72B. Instead, the Board decided not to rely on any prepared budget for that fiscal year.

The proposed 1982 budget projected a 51.2% increase in total revenues in 1982. From this growth projection, Reilly calculated growth projections for succeeding years by scaling down the growth rate by 10% each year until he reached his own estimate of long term growth of 20 percent. He thus calculated a 40% increase in total revenues in 1984, a 30%

increase in 1985, and a 20% increase in 1986. Using these growth rates, he calculated net revenues in each year using both the estimated 1982 sales figures and estimated 1982 costs and expenses. He then discounted each year's projected net income using the present value discount rate of 26 percent. Without making any adjustments to reflect the value of the New Projects, he calculated the sum of the present value of net income from April 1, 1982 through 1986 to be $15.839 million.[13] He calculated the terminal value of the company, discounted to its present value, to be $43.969 million. He thus found the fair market value under the DCF method to be approximately $56.2 million.

The Court finds that the DCF method should be rejected in this particular case. Because the DCF method rests entirely on projections of income, it does not offer the inherent accuracy of the actual historical income figures used in the DCAP method. Rather, its reliability depends heavily on the basis of the projections. As stated in Reilly's text, *Valuing a Business,* "the Discounted Economic Income Method is practical only to the extent that the projections used are reasonable to the decision-maker for whom the valuation is being prepared. Without supportable projections, the discounted income method can convey an aura of precision that is not warranted." Tr. 2/17/00 a.m. at 49.

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[13] A normal procedure to calculate projections of future income would have been to interview company management who were present during the relevant time and obtain their projections of relevant data. Reilly was unable to do this because Iran refused to grant him a visa permit, although it did grant such a permit to Richman for the same purpose.

The Court finds that the figures in the 1982 budget are not a sufficiently reliable basis for projecting future income. First, the budget, entered into evidence as Pl.Ex. 20, contains a number of significant errors, although it is not clear whether they are errors in the original Farsi-language version of the proposed budget or errors in the English translation which Reilly relied upon. For example, the very first numbers on the budget indicate that sales of plain milk in 1/4 liter bottles rose from approximately 2.5 million units in 1980 to 22 million units in 1981, or roughly 880%, a clearly erroneous value. In fact, the budget also states that the variance between the two years is only 11 percent. Further, the budget prediction for 1982 sales is approximately the same as in 1981, but the budget asserts that this constitutes a 22% rise in sales. Projected figures for the increase in total sales in 1982 are also facially inconsistent. Separate figures for total sales of each separate product line sum up to an increase of approximately 3.6 billion rials while the single figure provided for total sales of all products shows a rise of only 3.1 billion rials. Given these facial errors in figures in the budget, the Court is unable to find that the figures accurately reflect the predictions of Pak Dairy's various departments.

Further, even ignoring the problem of mathematical errors, the projections cannot be reasonably relied upon. Approximately 80% of the 51.2% increase in 1981 was attributed to a rise in butter sales revenues, which were predicted to increase by 91.7 percent. This projection was based on the assumption that the plant would be producing butter at a rate near its full capacity. However, while supply problems overall were improving for Pak Dairy, as noted above, they were not eliminated by April of 1982, nor was it likely that they would be entirely eliminated during the remainder of the

year.[14] Indeed, even the Managing Director's predictions (which he made in a letter to the Board which accompanied the proposed budget) do not on their face support the conclusion of full capacity production for all of 1982. The letter dated February 20, 1982 states only that the company "*will be able* to secure all raw materials" needed for maximum production, Pl.Ex. 18 (emphasis added), not that they had already done so. In any event, it was known in April of 1982 that the company to that date had not approached full capacity production in either butter or milk in the early months of 1982 and that the proposed budget numbers were therefore necessarily erroneous. The prediction of 51% growth for 1982 was thus not one which a reasonable investor would rely upon in April of 1982.

The fact that the budget was ultimately rejected by the Board, standing on its own, would not necessarily condemn the budget's accuracy. However, it reinforces the Court's conclusion based on the proposed budget itself that the forecasts are not a reliable basis for calculating the market value of Pak Dairy. Accordingly, the Court will rely solely on the value calculated under the DCAP method in determining the fair market value of the company.

H. The Dividends

Pak Dairy declared a dividend for 1980 income on March 17, 1981 which was approved by the shareholders on

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[14] It is noted, however, that contrary to Dadyar's testimony, the sales predicted in the proposed 1982 budget were not beyond the capacity of Pak Dairy. The budget predicted sales of 17,000 tons of butter per year. Pak Dairy's full annual capacity, however, was at least equal to 60 tons per day multiplied by 365 days or 21,900 tons.

April 11, 1981 (the "1981 dividend"). The total dividend amount was 119,790,000 rials. On April 4, 1982, Pak Dairy again declared a dividend for 1981 income equal to 119,790,000 rials.

The total dividends declared were not the amounts actually paid to Pak Dairy's shareholders, however. Because personal income taxes on the issued dividends were withheld by Pak Dairy, what shareholders received was the after-tax amount. For McKesson, the after-tax amount was equal to 30,710,134 rials for the 1981 dividend and 28,880,545 rials for the 1982 dividend.

Under Pak Dairy's original articles of association, payment of these dividends was due within four months after the approval of the shareholders' general meeting. This four month period applied to the dividends issued on April 11, 1981. However, in October of 1981, the Board of Directors changed this period to eight months from the general shareholder's meeting. Although no specific date of the general shareholder's meeting was mentioned at trial, the Court infers that the right to dividends accrued on April 4, 1982, the same date on which they were declared, and that payment was due eight months later.[15] Therefore, payment of the 1981 dividends was due on August 11, 1981, and payment of the 1982 dividends was due on December 4, 1982.

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[15] This is consistent with the decision of the Claims Tribunal, which, after noting the four month rule in the articles of association, found that Pak Dairy's 1979 and 1980 dividends became due and payable four months after the date on which they were declared. *See Foremost Tehran,* 10 Iran-U.S. Cl. Trib. Rep. at 252.

II. Conclusions of Law

A. Standard of compensation

This Court has ruled that under both customary international law and the Treaty of Amity, Iran's interference with McKesson's equity interest in Pak Dairy amounted to a full expropriation of that interest by April of 1982 and that, as part of that expropriation, Iran had wrongfully withheld payment of the 1981 and 1982 dividends in the same manner as it had the 1979 and 1980 dividends. Under both customary international law and the Treaty of Amity, Plaintiffs are entitled to an award of damages equivalent to the full value of the property expropriated. The Treaty of Amity specifically states:

> Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken ....

Treaty of Amity, Art. IV, para. 2. Customary international law similarly provides that compensation for expropriated property of a foreign national must be "just," Restatement (Third) of the Foreign Relations Law of the United States § 712 (1987) [hereinafter "Restatement"], and that "[f]or compensation to be just ... it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and

paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national." *Id.; see Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 711 (9th Cir.1992) (following § 712 of Restatement); *Crist v. Republic of Turkey,* 995 F.Supp. 5, 10-11 (D.D.C.1998) (same); *see also Starrett Housing Corp. v. Government of the Islamic Republic of Iran,* 314-24-1, ¶ 261 (August 14, 1987), *reprinted in* 16 Iran-U.S. Cl. Trib. Rep. 112, 195 (1988) (*Starrett*) (holding that Treaty of Amity requires that compensation for expropriated property be "just" and "shall represent the full equivalent of the property taken" as of the date of taking).

The "full value" of the property is "usually 'fair market value' where that can be determined." Restatement, § 712 cmt. d. "Such value should take into account 'going concern value,' if any, and other generally recognized principles of valuation." *Id.* The parties do not dispute that Pak Dairy is properly valued as a going concern nor is there a dispute that the income-based methods of valuation, including the DCAP method, are among the generally recognized methods of valuing a going concern. The Court concludes that the DCAP method as used above is appropriate to determine the value of Pak Dairy and that the company's value as of April 1982 was therefore $22,237,059.85.

B. Appropriateness of Minority or Marketability Discounts

In calculating the value of McKesson's 31% interest in Pak Dairy, Richman took a 35% minority discount and a 10% lack of marketability discount. A minority discount adjusts for lack of control over the business entity on the theory that non-controlling shares of stock are not worth their proportionate share of the firm's value because they lack voting power to control corporate actions. *See Lawson Mardon*

Wheaton, Inc. v. Smith, 160 N.J. 383, 734 A.2d 738, 747 (1999). A lack of marketability discount adjusts for a lack of liquidity in an equity interest because the company is not publically traded. *See id.* Although Reilly did not dispute that McKesson's interest did not include control and that in 1982, Pak Dairy was not publically traded, he nevertheless did not apply either discount, testifying that his valuation already reflected a minority level of value and that a lack of marketability discount was inappropriate where the seller was not willing. Plaintiffs also argued that both discounts are inapplicable as a matter of law when valuing expropriated equity. Although the Court is not persuaded that Reilly's valuation methods resulted in a minority level of value, it nevertheless declines to apply either a minority or lack of marketability discount because the law bars the use of such discounts in the circumstances of this action.

It is appropriate to begin with analogous domestic law, which has addressed the legal propriety of minority and marketability discounts in appraisal actions extensively in recent years. While the case law is not entirely uniform, some principles now command the overwhelming majority of courts. One such principle is that when a court is required in an appraisal action to value a minority interest which is being purchased by the majority shareholder or the corporation itself, then no minority or lack of marketability discount is appropriate. *See Arnaud v. Stockgrowers State Bank of Ashland, Kansas,* 268 Kan. 163, 992 P.2d 216, 218-220 (1999) (collecting cases and commentary, and following majority position); *Lawson Mardon Wheaton, Inc.,* 734 A.2d at 748 ("equitable considerations have led the majority of states and commentators to conclude that marketability and minority discounts should not be applied when determining the fair value of dissenting shareholders' stock in an appraisal action"). Courts rejecting the minority discount have reasoned that the application of the

discount would provide the majority with a windfall because they would receive a controlling level of value from the newly obtained shares but only have to pay a non-controlling price for them. *Id. See also Hansen v. 75 Ranch Co.*, 288 Mont. 310, 957 P.2d 32, 41 (1998) ("a sale to a majority shareholder ... simply consolidates or increases the interests of those already in control. Therefore, requiring the application of a minority discount when selling to an 'insider' would result in a windfall to the transferee."); *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1144 (Del.1989) (same). Courts have followed the same reasoning in denying a lack of marketability discount, since the marketability of shares is generally affected by whether the shares being marketed provide control. *See Arnaud*, 992 P.2d at 219; *Security State Bank, Hartley, Iowa v. Ziegeldorf*, 554 N.W.2d 884, 889 (Iowa 1996) (refusing to apply lack-of-marketability discount because it did not reflect value of controlling interest).[16] Courts further observe that in a forced sale, discounts are inherently unfair to the forced-out shareholder who did not pick the timing of the transaction and thus is not in the position of a willing seller. *See Hansen*, 957 P.2d at 41. Because allowing discounts creates incentives for oppressive behavior, both discounts are particular disfavored where the stock trade is a result of such behavior. *See Morrow v. Martschink*, 922 F.Supp. 1093, 1105 (D.S.C.1995) (" 'it would be inappropriate to impose a discount in a dissenters' rights case or in a case where a minority interest has been improperly squeezed out of the business. Allowing [marketability or minority] discounts in these situations would undercut the purpose of dissenters' rights statutes to give minority shareholders the fair value of their shares, and it could also encourage squeeze outs.' ") (quoting Harry J. Haynsworth,

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[16] The connection between minority status and the marketability of the shares was also noted at trial by Richman.

Valuation of Business Interests, 33 Mercer L.Rev. 437, 488 (1982)).

Admittedly, these cases involve interpretations of domestic corporate law statutes, not the valuation of an expropriated property under customary international law. However, the position of the foreign shareholder in the face of an expropriating government is analogous to that of the oppressed or forced-out minority and raises the same concerns. Further, the case law of the Iran-U.S. Claims Tribunal, which is the only international precedent on the issue which has come to the Court's attention, follows the same practice described above. In *Shahin Shaine Ebrahimi v. Government of the Islamic Republic of Iran*, Award No. 560-44/46/47-3 (October 12, 1994) (Westlaw/Int- Iran), the Tribunal addressed both minority and lack of marketability discounts in the context of valuing expropriated shares. It noted that it had previously held explicitly that "a minority discount cannot properly be applied to the value of a minority participation of shareholders in an expropriated case." *Id.* at ¶ 167. It reaffirmed that "while there could be reasons 'to justify the discount of the Claimant's share ... in the context of a valuation in view of an actual sale of shares on the open market,' these reasons were 'not applicable in the context of a deprivation valuation, especially in a case like this one, where the expropriating entity not only expropriated the minority share, but the whole company.' " *Id.* (quoting *Harold Birnbaum v. The Islamic Republic of Iran*, Award No. 549-967-2, ¶ 146 (July 6, 1993)).

The Tribunal similarly rejected the application of a lack of marketability discount, arguing *inter alia* that such a discount was simply inappropriate in the context of an expropriation. It stated that "it must be borne in mind that in an expropriation context such as the present, there is no prospective buyer investing in a closed company who must be offered a discount

on the offered shares' face value to reflect the illiquidity of the shares." *Id.* at ¶ 170.

Defendant argues that *Ebrahimi* and *Birnbaum* are distinguishable in that the Tribunal in those cases valued the relevant company using an asset-based approach rather than a discounted future income approach. However, the companies were valued as going concerns, *see Shahin Shaine Ebrahimi* at ¶ 97 ("the Tribunal cannot agree with the Respondent that [the company] had ceased to be a going concern at the valuation date" and valuing company based on assets "plus an amount reflecting its intangible values, including its goodwill, if any"); *Birnbaum* at ¶ 38; *see also Vera-Jo Miller Aryeh v. Islamic Republic of Iran*, Award No. 581-842, ¶ 242 (May 22, 1997) (Westlaw/Int- Iran) (applying *Birnbaum* rule in valuing going concern). It is thus clear that the Tribunal's rule applies to going concern valuations such as the Court has performed here and there is nothing in the Tribunal's decisions to suggest that the rule varies depending on what method of going concern valuation is adopted. Certainly, Iran has not pointed to any decision of the Tribunal or any other international forum which applied either minority or lack of marketability discounts to valuations of expropriated stock. Accordingly, no minority or lack of marketability discount should be taken. Instead, McKesson is entitled to 31% of the full value of Pak Dairy calculated above, or $6,893,488.55.

C. Value of the Dividends

1. Pre-Tax or Post-Tax

The parties dispute whether the Court should award Plaintiffs the value of their dividends before taxes or after taxes. It is undisputed that the Iran-U.S. Claims Tribunal, after finding that McKesson had been unlawfully deprived of its share of the

1979 and 1980 dividends, awarded it an after-tax amount. *See Foremost Tehran, Inc,* 10 Iran-U.S. Cl. Trib. Rep. at 252. However, Plaintiffs argue that the dividends should not be reduced to account for tax withholding because customary international law, they assert, holds that a foreign nation's tax laws are not enforceable in this Court. This proposition, even if true, does not affect Plaintiffs' entitlement to compensation. Plaintiffs' entitlement is limited to "the value of the property taken." Restatement, § 712. That part of the dividends which would be withheld for taxes could not have been "taken" from them since they had no legal entitlement to receive such funds and would not have received them even absent the expropriation. Accordingly, the Court concludes that Plaintiffs are entitled to receive only the after-tax value of their dividends, which is 30,710,134 rials for the 1981 dividend and 28,880,545 rials for the 1982 dividend.

2. Appropriate Currency Exchange Rate for Lost Dividends

The parties agree that the exchange rate to apply in converting Plaintiffs' dividends to dollars is the exchange rate prevailing at the time the right to the benefits accrued, i.e. April 1981 and April 1982 respectively. However, they disagree sharply on how to determine that rate. Plaintiffs argue that the appropriate rate of conversion for the Court to use is the official exchange rate, which was 80.03 rials to the dollar in 1981 and 84.45 rials to the dollar in 1982. Iran, on the other hand, argues that the official rate was both unrealistic and unavailable and that the Court should apply the rate available on the open market in Iran at the relevant times.

The Restatement provides the following rule regarding "judgments on obligations in foreign currency":

> If, in a case arising out of a foreign currency obligation, the court gives judgment in dollars, the conversion from foreign currency to dollars is to be made at such rate as to make the creditor whole and to avoid rewarding a debtor who has delayed in carrying out the obligation.

Restatement, § 823(2). The Reporter's Notes further discuss the method of determining the relevant exchange rate, finding that an official rate may properly be relied upon to convert a foreign currency obligation into dollars unless such a rate does not exist or does not reflect "actual economic conditions." Restatement, § 712, Reporter's Note 5 (citing *Vishipco Line v. Chase Manhattan Bank, N.A.*, 754 F.2d 452 (2d Cir.1985)). In that event, a court "may look to any market rate that reasonably reflects economic reality on the relevant date." *Id.*

Courts considering the propriety of using a government's official exchange rate to convert a foreign currency obligation have also suggested that use of an official rate may be appropriate where the rate is available for the purpose of converting obligations of the sort involved in the case. Thus, the court in *U.S. Life Ins. Co. v. Alonso,* 201 So.2d 577 (Dist.Ct.App.Fla.1967) found that a court should not rely upon an official rate of exchange which was "established for other purposes and does not apply to transactions in controversy." 201 So.2d at 579 (quoting *Hughes Tool Co. v. United Artists Corp.*, 279 A.D. 417, 110 N.Y.S.2d 383 (N.Y.App.Div.1952), *aff'd,* 304 N.Y. 942, 110 N.E.2d 884 (1953)) (internal quotations omitted); *see also Vishipco Line v. Chase Manhattan Bank, N.A.*, 754 F.2d 452, 455 (2d Cir.1985) ("Where local currency restrictions would prevent a party from converting its money into dollars, New York courts have been disinclined to employ 'official' exchange rates, seeking instead to

appraise realistically the relative value of the currencies.").

Several facts in the record lead the Court to conclude that the official rate was available for the conversion of Pak Dairy's currency obligations to McKesson. First, the Iran-U.S. Claims Tribunal, acting against the backdrop of international law and the Treaty of Amity, has consistently found it appropriate to convert the value of foreign obligations using the official exchange rate. *See, e.g., Starrett,* 16 Iran-U.S. Cl. Trib. Rep. at 223; *see also International Technical Products Corp. v. Government of the Islamic Republic of Iran,* Award No. 196-302-3 (October 28, 1985), *reprinted at* 9 Iran-U.S. Cl. Trib. Rep. 206, 227 (1987) (referring to official rate as "the market rate prevailing at that time"). Indeed, the Tribunal applied the official rate in converting McKesson's 1979 and 1980 dividends, the dividends declared immediately prior to those at issue here. *See Foremost Tehran, Inc.,* 10 Iran-U.S. Cl. Trib. Rep. at 252. In addition, the Court finds that, before 1979, McKesson would receive its Pak Dairy dividends in dollars converted according to the official rate and that during the early 1980s, Pak Dairy's audited statements continued to state its foreign currency obligations, including liabilities to foreign parties, at the official exchange rate and that it continued to purchase foreign goods using rials converted to dollars at the official rate. Finally, although currency exchange at the official rate was available in 1981 and 1982 only from the Central Bank, there was no convincing evidence at trial in light of the circumstances noted above that the Central Bank would have refused conversion of McKesson's dividends. Accordingly, the Court will apply the 80.03 rial-to-dollar conversion rate for the 1981 dividend and the 84.45 rial-to-dollar conversion rate for the 1982 dividend. Applying these rates, McKesson is owed $383,732.78 for the 1981 dividend and $341,983.96 for the 1982 dividend.

D. Pre-judgment Interest

Plaintiffs seek prejudgment interest running from the time of the expropriation (or, for the dividends, the time when the dividend was declared). They seek a rate equal to the average annual prime rate in the United States over the period from the taking to the present, with interest compounded annually.

Iran argues that no interest should be applied at all because current Iranian law forbids it. Alternatively, it asserts that the Court should adopt the rate used by the Iran-U.S. Claims Tribunal, and should also follow the Tribunal's practice of awarding simple rather than compound interest. It further argues that the running of interest should be tolled because the action was suspended between 1982 and 1986 and because of equitable considerations.

1. Entitlement to Prejudgment Interest

Customary international law provides that, where property has been expropriated, just compensation must be paid "at the time of taking, or within a reasonable time thereafter with interest from the date of taking ...." Restatement § 712. This is a natural recognition of the fact that "[m]oney today is not a full substitute for the same sum that should have been paid [18] years ago." *Matter of Oil Spill by Amoco Cadiz Off Coast of France on March 16, 1978,* 954 F.2d 1279, 1331 (7th Cir.1992); *cf. West Virginia v. U.S.,* 479 U.S. 305, 310, 107 S.Ct. 702, 93 L.Ed.2d 639 (1987) ("Prejudgment interest is an element of complete compensation"). Iran's reliance on the Iranian prohibition of interest is inapposite since the entitlement to prejudgment interest is determined by the governing substantive law, *see Terwilliger v. Terwilliger,* 206 F.3d 240, 249 (2d Cir.2000) ("The award of prejudgment interest is a

substantive issue"), and Plaintiffs have based their expropriation claim on substantive rights created not by Iran's domestic law but by customary international law and the Treaty of Amity which incorporates it.[17] Thus they are entitled to the compensatory interest payments which such law provides for.

Iran argues that the rule of compensation expressed in Restatement § 712, requiring interest from the date of taking, is inapplicable to the dividends because their withholding is allegedly a "breach of contract" rather than a taking of property. In fact, the right to dividends is an aspect of the property rights which constitute McKesson's 31% equity interest. Thus, their withholding was considered by both the Tribunal and this Court in determining whether McKesson's interest in Pak Dairy had been expropriated. *See Foremost Tehran, Inc,* 10 Iran-U.S. Cl. Trib. R. at 252 (finding that "claim for expropriation" included "a claim for a lesser degree of interference with its rights" such

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[17] Interestingly, Iran has relaxed its prohibition on interest in one respect. In a 1988 opinion from the Guardian Council, the religious body responsible for ensuring that Iranian laws are in accordance with Muslim prescripts, the Council stated that payment of interest *from* foreign nationals *to* Iranian citizens was permissible where such payments were promised by contract. *See* John Y. Gotanda, 90 Am. J. Int'l L. 40, 49 (1996); *Ministry of Defense and Support for Armed Forces of the Islamic Republic of Iran v. Bowen-McClaughlin-York Co./Harsco Corp.*, Case No. 7263/CK, Int'l Ct. of Arb. (Sept. 18, 1996) (attached to Defendant's Revised Proposed Findings as Exh. III) (hereinafter "*Ministry of Defense* "). Whether this exception extends to payment to foreigners is less clear, *id.*, but in its current form it appears more motivated by economic advantage than Islamic command. Interestingly, *Ministry of Defense* presents something of a mirror of the instant case: that is, it involved an organ of the Iranian government seeking payment of interest from an American corporation based on the interest exception rule. Although the court in *Ministry of Defense* was willing to apply Iranian law (as both parties requested), it refused to apply the interest exception, concluding that because of its discriminatory character it had no place in the international context.

as withholding of dividends); *McKesson Corp.*, Mem. Op. at 24, 1997 WL 361177 at *12; *cf. Mainord v. Sharp*, 569 P.2d 546, 548 (Okla.Ct.Ap.1977) ("shareholder's property rights" include "proportionate share of the dividends, and assets on dissolution"). The Court holds that the rule for injury to property applies and that Plaintiffs are entitled to prejudgment interest on both their expropriated equity and the two dividends.[18]

2. Appropriate Rate

International law does not prescribe any particular rate of interest. Accordingly, the applicable rule is the rule of reasonable discretion which governs the award of prejudgment interest in federal courts generally. *See Forman v. Korean Air Lines Co., Ltd.*, 84 F.3d 446, 450 (D.C.Cir.), *cert. denied, Korean Air Lines Co., Ltd. v. Forman*, 519 U.S. 1028, 117 S.Ct. 582, 136 L.Ed.2d 513 (1996). The average prime rate which Plaintiffs argue for has been repeatedly held as appropriate by the D.C. Circuit; indeed, the D.C. Circuit has found it "more appropriate" than a fixed investment rate like the 6-month Certificate of Deposit rate which Iran suggests. *Id.* There is no circumstance in this case suggesting that it would be less appropriate here than in *Forman*. Accordingly, the Court will award interest at the average prime rate of 9 percent.[19]

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[18] It is therefore unnecessary to decide whether the rule regarding entitlement to interest on monies owed pursuant to contract under international law would be any different.

[19] The Restatement does provide that for interest on money obligations, a court "may, in appropriate cases, order interest to be based on the interest rate applicable at the principal financial center of the state issuing the currency in which the judgment is payable." Restatement § 823 cmt. e. To the extent that this rule is applicable, it is consistent with the choice of the prime rate.

3. Method of Calculation--Compound or Simple

The parties dispute whether the Court should calculate prejudgment interest using a compound or simple method. Iran asserts that customary international law provides only for simple interest. Plaintiffs argue that customary international law leaves the method of calculation to the discretion of the forum, and that this Court should therefore apply domestic federal law in resolving the question.

"[I]n ascertaining and administering customary international law, courts should resort to 'the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators.' " *Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 715 (9th Cir.1992) (quoting *The Paquete Habana,* 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900)). The Court finds that international courts have over a period of decades followed the custom of granting only simple interest. Indeed, one commentator found, after canvassing available case law, that "[t]here are few rules within the scope of the subject of international law that are better settled than the one that compound interest is not allowable." M. Whiteman, III *Damages in International Law* 1997 (1943). This international custom has been noted again in commentary more recent, *see* Mann, F.A., *Compound Interest as an Item of Damage,* in F.A. Man, Further Studies in International Law (1990), at 378 (finding that international tribunals "generally reject" the method of compound interest but arguing that the practice should change) (citation and internal quotation omitted), and was expressly adopted by the Iran-U.S. Claims Tribunal. *See, e.g., R.J. Reynolds Tobacco Co. v. The*

Government of the Islamic Republic of Iran, Award No. 145-35-3 (August 6, 1984), *reprinted in* 7 Iran-U.S. Cl. Trib. R. 181, 191 (1986) (relying on excerpt of *Damages in Int'l Law* quoted above). Following this rule, the Tribunal has never awarded compound interest. *See Anaconda- Iran, Inc. v. Government of the Islamic Republic of Iran,* Award No. 65-167-3, at ¶ 138 (December 10, 1986), *reprinted at* 13 Iran-U.S. Cl. Trib. R. 199, 234 (1988). There are a few instances in which other international tribunals have awarded compound interest. *See Renusagar Power Co. v. General Elec. Co.,* Award No. 19 (High Court Bombay, Oct. 12, 1989), *reprinted in* 16 Y.B. Com. Arb. 553, 561-66 (1991); *Kuwait v. American Independent Oil Company (Aminoil),* 21 I.L.M. 976, 1042 (1982). However, in enforcing customary international law, the Court is constrained to follow the custom, not the rare exception, even if there are strong policy reasons to believe that the exception should be the rule. Accordingly, prejudgment interest will be awarded at the prime rate using the simple method of calculation.

4. Date From Which Interest Will Run

With regard to the 1981 and 1982 dividends, interest should technically run from the dates of taking, April 11, 1981 and April 4, 1982, respectively. However, because the dividends did not become due under the articles of association until several months later, their value on the date of taking would be some discounted amount of their value on the due date. Instead of calculating this discount, the Court will simply calculate interest from the due date, following the practice of the Tribunal. *See* 10 Iran-U.S. Cl. Trib. Rep. at 252.

With regard to McKesson's 31% interest in Pak Dairy, the Court has previously held that the creeping expropriation of McKesson's shareholder rights ripened into a compensable

taking by April of 1982:

> By that time, McKesson had not received its dividends for a fourth consecutive year. McKesson had no voice in the management of the company since October 1981, and McKesson had received no shareholder communications from Pak Dairy since it had requested them to be sent in October 1981.

Mem. Op. at 24, 1997 WL 361177 at *12. Given that the Board declared its 1982 dividend on April 4, 1982, it is appropriate for the Court to treat the precise valuation date from which interest is to run as April 5, 1982.

Iran argues that the date from which interest runs should be tolled during the time the instant action was stayed pending resolution of Plaintiffs' claims before the Iran-U.S. Claims Tribunal. Under the Algiers Accords and pursuant to Executive Order No. 12294, 46 Fed.Reg. 14111, all "claims which may be presented to the ... Tribunal" were "suspended." Such suspension "terminates if the Claims Tribunal determines that it has no jurisdiction over that claim ...." *Dames & Moore v. Regan,* 453 U.S. 654, 665-66, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981). Pursuant to this authority, this action, commenced on January 22, 1982, was suspended until April 10, 1986 when the Tribunal issued its ruling.

The Court does not agree that this suspension tolled the accrual of interest. The effect of the suspension was merely to bar Plaintiffs from prosecuting their claim during the relevant period. The suspension did not in any way affect the measure of damages on claims that were subsequently revived. For expropriated property, that measure is the full equivalent of the property at the time of the taking "with interest *from the date of*

the taking." Restatement § 712 (emphasis added). Plaintiffs are therefore entitled to interest during the time when their action was suspended.

Iran next argues that because, after receiving the Tribunal's 1986 judgment, Plaintiffs waited until April 1, 1988 to revive their action, they are barred by the equitable doctrine of laches from seeking interest between 1986 and 1988. Iran relies on *West Virginia v. U.S.*, 479 U.S. 305, 107 S.Ct. 702, 93 L.Ed.2d 639 (1987), which stated, in a footnote, that "an equitable consideration such as laches" may "bar an otherwise valid claim for interest ...." *Id.* at 311 n. 3, 107 S.Ct. 702. However, the equitable considerations *West Virginia* referred to are applicable only where the law leaves it "for the federal courts to determine, according to their own criteria, the appropriate measure of damage ...." *Id.* at 309, 107 S.Ct. 702. Such considerations do not apply where the measure of damage is itself defined by the substantive law. Thus, *West Virginia* distinguished cases where prejudgment interest was commanded "by an applicable federal statute." *Id.* Here, customary international law expressly directs that interest be provided as "the appropriate measure of damage." Accordingly, it is not for the Court to determine by its own criteria whether to grant it.

Further, even if this Court had discretion to consider laches, it would be found inapplicable. Laches is an affirmative defense that requires findings that the plaintiff delayed unreasonably in raising a claim and that the defendant was prejudiced thereby. *See Burka v. Aetna Life Ins. Co.*, 56 F.3d 1509, 1514 (D.C.Cir.1995). However, Plaintiffs did not delay at all in raising their claim of expropriation in 1982. Although when reviving their claim, Plaintiffs did alter the theory somewhat by alleging a later date and additional instances of interference with their rights leading up to that date, the essential claim was identical: a creeping interference with

Plaintiffs' shareholder rights which ultimately ripened into an unlawful expropriation of the equity interest. Further, Plaintiffs' delay in reviving their claim (if that were relevant) was not unreasonable, and in any case, Iran has demonstrated no prejudice by the delay. The additional interest owed is simply the application of the same measure of "just compensation" which Iran owed all along.

Iran also argues that Plaintiffs are barred from receiving interest for having failed to mitigate damages. This argument rests on Defendant's assertion that Plaintiffs could have obtained their dividends at any time by coming to Pak Dairy in Tehran and making an on-site request for the dividends. Defendant asserts that Plaintiffs had a duty to do so. The Court has previously found as a matter of law that Plaintiffs had no such duty and that even if McKesson had made an on-site request for dividends, it would have been futile. *See* Mem. Op. at 21-22, 1997 WL 361177 at *10-11.

More generally, the Court simply finds untenable the notion that Iran has any equitable claim against the Plaintiffs in this matter. What both equity and international law demand is that Plaintiffs receive the equivalent value of their expropriated property including its time value since the date of taking. For all of these reasons, the Court finds that no tolling of interest is appropriate.

III. Conclusion

Calculating simple interest at 9% from August 12, 1981 to May 26, 2000, the Court finds that Plaintiffs are owed $649,370.76 in interest on the 1981 dividend. Calculating from December 5, 1982 to May 26, 2000, the Court finds that Plaintiffs are owed $538,246.26 in interest on the 1982 dividend. Finally, calculating from April 5, 1982 to May 26,

2000, the Court finds that Plaintiffs are owed $11,264,338.03 in interest on the expropriated equity.

In sum, the Court finds that Plaintiffs are entitled to the following: $383,732.78 for the 1981 dividend plus $649,370.48 in interest; $341,983.96 for the 1982 dividend plus $538,245.34 in interest; and $6,893,488.55 for the expropriated equity plus $11,264,338.03 in interest, for a total compensatory award of $20,071,159.14.

An appropriate judgment will accompany this decision.

Date: May 26, 2000

/s/Thomas A. Flannery
Thomas A. Flannery
United States District Judge

APPENDIX F

FILED
MAY 26, 2000
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

United States District Court, District of Columbia.

McKESSON CORPORATION; Foremost Tehran, Inc.; Foremost Shir, Inc.; Foremost Iran Corporation; and Overseas Private Investment Corporation, Plaintiffs,

v.

THE ISLAMIC REPUBLIC OF IRAN; Financial Organization for the Expansion of Ownership of Productive Units; National Investment Company of Iran; Industries and Mines Bank; Foundation for the Oppressed; and Sherkat Sahami Labaniat Pasteurize Pak, Defendants.

No. 82-00220(TAF)

JUDGMENT

The Court having found that defendant Islamic Republic of Iran is liable and that the remaining defendants have defaulted, and upon consideration of the findings of fact and conclusions of law set forth in the Court's Memorandum Opinion of this date, it is hereby

ORDERED, ADJUDGED AND DECREED that

judgment is entered in favor of the Plaintiffs McKesson Corporation, Foremost Tehran, Inc., Foremost Shir, Inc., Foremost Iran Corporation, and Overseas Private Investment Corporation, jointly and severally, and against defendants the Islamic Republic of Iran, Financial Organization For The Expansion of Ownership of Productive Units, National Investment Company of Iran, Industries And Mines Bank, Foundation For The Oppressed, and Sherkat Sahami Labaniat Pasteurize Pak, jointly and severally, in the amount of $20,071,159.14, plus post-judgment interest as provided by law until this judgment is paid in full.

Date: May 26, 2000

/s/Thomas A. Flannery
Thomas A. Flannery
United States District Judge

APPENDIX G

FILED
JUNE 23, 1997
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

United States District Court, District of Columbia

McKESSON CORPORATION, et al., Plaintiffs,
v.
THE ISLAMIC REPUBLIC OF IRAN, et al., Defendants.

No. 82-220 TAF

June 23, 1997

MEMORANDUM OPINION

FLANNERY

Before the Islamic Revolution, an American company invested in an Iranian dairy. As a result of the Revolution, the Islamic Republic of Iran gained control of the dairy in 1979. In this lawsuit, the American company claims the Iranian government used its majority position on the dairy's board of directors to expropriate the company's equity interest in the dairy. The case is before the Court on the plaintiffs'[1] motion

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[1] The American company co-plaintiffs in this case are several of its wholly-owned subsidiaries, *see* footnote 3, and the Overseas Private Investment Corporation, an agency of the United States which insures private overseas investments of United States nationals. *See* 22 U.S.C. § 2191.

for summary judgment on the issue of Iran's liability for the alleged expropriation, and on Iran's own motion for summary judgment. After carefully considering the written submissions of the parties and the United States,[2] as well as the argument of counsel at the hearing on this matter, the Court shall grant the plaintiffs' motion and enter judgment in their favor on the issue of Iran's liability.

I. BACKGROUND

In 1959, Foremost-McKesson, Inc. ("McKesson"),[3] a Maryland corporation, agreed to join a group of Iranian citizens in establishing a dairy, the Sherkat Sahami Labaniat Pasteurize Pak ("Pak Dairy"), in Iran. McKesson contributed capital, personnel and technical support to Pak Dairy, providing its top management and controlling its board of directors until 1979, by which time it owned a 31 percent equity interest in the enterprise.

In 1982, McKesson and the Overseas Private Investment Corporation sued Iran in this Court, claiming that the government of Iran, acting through its alleged agencies and

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[2] Pursuant to 28 U.S.C. § 517, the United States has filed a friend of the court brief regarding the Court's consideration of the Iran-United States Claims Tribunal's 1986 decision in *Foremost Tehran, Inc. v. Government of the Islamic Republic of Iran*, (April 10, 1986) ("Tribunal Award"), *reprinted in* 10 Iran-U.S.C.T.R. 228 (1986).

[3] On July 27, 1983, Foremost-McKesson, Inc. changed its name to McKesson Corporation. This entity--as well as its affiliates and co- plaintiffs Foremost Tehran, Inc., Foremost Shir, Inc., and Foremost Iran Corporation--shall be referred to collectively as "McKesson."

instrumentalities,[4] had expropriated McKesson's equity interest in Pak Dairy. The plaintiffs alleged, among other things, that Pak Dairy had unlawfully withheld dividends from McKesson over a period of years, while continuing to pay dividends to its Iranian shareholders. The plaintiffs sought damages for the insured portion of McKesson's equity interest in the Iranian company, which amounted to 19.84 percent of the dairy's total shares.

Under the terms of Executive Order 12,294, 46 Fed.Reg. 14,111 (1981)-- issued pursuant to the Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 Int'l Law Materials 224 (1981) ("Algiers Accords" or "Accords")--this lawsuit was suspended while McKesson submitted its claims to the Iran-United States Claims Tribunal ("Claims Tribunal" or "Tribunal") in The Hague.

In 1986, the Tribunal decided McKesson's claims. The Tribunal determined that private property may be expropriated even if the owner retains formal legal title to the property and even if the state does not acknowledge the expropriation. Tribunal Award at 22. It also recognized the legal doctrine of "creeping expropriation," under which a state's taking of private property may result from a *series* of interferences with that property:

> A claim for a taking is outstanding on the day of the taking of property. Where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property,

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[4] The plaintiffs sued the alleged agencies and instrumentalities of Iran as well. Only Iran, however, entered an appearance in this case.

> *the breach forming the cause of action is deemed to take place on the day when the interference has ripened into more or less irreversible deprivation of the property* rather than on the beginning date of the events.

Tribunal Award at 29 (emphasis added); *see also Phillips Petroleum Co. Iran v. Iran*, 21 Iran-U.S.C.T.R. 79, 106 (June 29, 1989) ("expropriation by or attributable to a State of the property of an alien gives rise under international law to liability for compensation, and this is so whether the expropriation is formal or *de facto* "); *accord Tippets, Aabbett, McCarthy, Stratton v. Tamms-Affa*, 6 Iran-U.S.C.T.R. 219, 225 (June 22. 1994); Restatement (Third) of the Foreign Relations Law of the United States (1987) § 712 Comment g and Reporter's Note 7.

Applying this standard, the Claims Tribunal concluded that Iran's interference with McKesson's rights had not amounted to an expropriation before January 19, 1981, the last date of the Tribunal's jurisdiction. *See* Algiers Accords at Art. II, ¶ 1, *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 348 n. 5 (D.C.Cir.1995) ("[a] claim must have been 'outstanding' on January 19, 1981, to fall within the jurisdiction of the Claims Tribunal"). Observing that McKesson had "continued, albeit circumscribed, participation in the affairs of [Pak Dairy]" until October 23, 1981, Tribunal Award at 27, the Claims Tribunal declined to find that Iran's interference in McKesson's property constituted an expropriation as of its jurisdictional cutoff date, *id* at 31, determining that the evidence of an expropriation was "finely balanced" as of that date. *Id.* at 29.

The Tribunal did conclude, however, that Iran was responsible for the withholding of cash and stock dividends from McKesson in 1979 and 1980, an "act" which "appears to

have been done with the object of discriminating against [McKesson]" and which "constituted a serious infringement of [McKesson's] right to enjoy the fruits of its holding in Pak Dairy." *Id.* The Tribunal awarded McKesson approximately $900,000 as compensation. In addition, the Tribunal awarded McKesson approximately $500,000 for Pak Dairy's breaches of its contractual obligations to McKesson. Pursuant to the Algiers Accords, Iran paid these amounts out of a security account established at The Hague.

After the Claims Tribunal issued its ruling, McKesson revived its lawsuit in this Court by filing a motion for partial summary judgment against Iran on the issue of liability. In that motion, McKesson alleged that its equity interest in Pak Dairy was expropriated after the Claims Tribunal's jurisdictional cutoff date. *See Dames & Moore v. Regan*, 453 U.S. 654, 684-85, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981) ("those claims not within the jurisdiction of the Claims Tribunal will 'revive' and become judicially enforceable in United States courts"). In response, Iran filed a motion to dismiss the plaintiffs' amended complaint for lack of jurisdiction under the Foreign Sovereign Immunities Act ("FSIA").[5] The Court denied Iran's motion, finding that Iran was not entitled to sovereign immunity because it met a statutory exception to immunity under the FSIA; the Court determined that Iran's actions were based "upon an act

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[5] The FSIA constitutes the sole basis on which a federal court may exercise jurisdiction over a foreign state. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-39, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). Under the FSIA, foreign states are immune from the jurisdiction of United States courts unless one of the specified statutory exceptions to immunity applies. 28 U.S.C. §§ 1330(a), 1604; *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1001 (D.C.Cir.1985).

outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

On interlocutory appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed this Court's judgment that the facts alleged by McKesson were "sufficiently commercial in nature" and "exhibited sufficiently direct effects to confer subject matter jurisdiction" under the provision of the FSIA quoted above. *See Foremost-McKesson v, Islamic Republic of Iran,* 905 F.2d 438, 450 (D.C.Cir.1990) (*"McKesson I"*).

The *McKesson I* Court also addressed the issue of whether Iran should be held responsible for the activities of its codefendants, the alleged agencies and instrumentalities on Pak Dairy's board. Noting that such agencies and instrumentalities are presumed to be separate from a foreign state under the FSIA, *id.* at 440 (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 625-28, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983)), the court of appeals concluded that this Court had not made sufficient factual findings to determine whether the presumption of separateness had been rebutted. *Id.* at 448-49. Accordingly, the *McKesson I* Court remanded "for more extensive findings on the degree of control exerted by Iran over Pak Dairy and over theshareholder entities that [McKesson] alleges are government controlled." *Id.* at 453.

On remand, after further development of the record, this Court found that Iran's co-defendants were organizations of the Iranian government which collectively held 52 percent of Pak Dairy's stock and controlled six of the seven seats on its board of directors. Finding evidence of Iran's "extensive involvement

in the day-to-day operations of Pak Dairy," including decisions concerning the payment of corporate dividends, the Court concluded that the evidence indeed established a principal-agent relationship between Iran and its co-defendant agencies and instrumentalities. Based on these findings, the Court concluded that it had subject matter jurisdiction over Iran based on the actions of its co-defendants, and denied Iran's motion to dismiss.

On a second interlocutory appeal, the court of appeals affirmed the Court's "comprehensive decision," sustaining the Court's "ruling on remand that the FSIA does not immunize Iran from a trial in this case." *McKesson v. Iran*, 52 F.3d 346, 352-53 (D.C.Cir.1995) ("*McKesson II*"), *cert. denied*, 516 U.S. 1045, 116 S.Ct. 704, 133 L.Ed.2d 660 (1996).

II. DISCUSSION

After two trips to the court of appeals, the plaintiffs have renewed their motion for summary judgment on the issue of Iran's liability for the alleged expropriation of McKesson's equity interest in Pak Dairy. Iran's motion for summary judgment is also pending before the Court:

This Memorandum Opinion is divided into three parts. The first part addresses the extent to which the Court is bound by prior rulings in this case. The second part evaluates the evidence of an expropriation. The third part discusses the legal basis for the plaintiffs' claims before the Court.

A. *Effect of Past Rulings*

There are a number of prior rulings in this now fifteen-year-old litigation, and the parties dispute the extent to which they bind the Court now. The Court shall resolve these

disputes below.

1. *The Claims Tribunal's Award*

Under the Algiers Accords (the agreement between) Iran and the United States that ultimately led to the release of the American hostages in Tehran), United States nationals must submit certain claims to the Claims Tribunal for arbitration.[6] The Accords provide that decisions by the Claims Tribunal are "final and binding." Claims Settlement Declaration, art. IV, § 1; *see also* 31 C.F.R. § 535.222(f) ("a determination by the Tribunal that a claimant shall have recovery on a claim or part thereof in a specified amount shall operate as a final resolution and discharge of such claim or part thereof for all purposes upon payment to the claimant of the full amount of the award...."). The Accords thus "reflect a contractual intent that the issues joined and resolved in the arbitration may not be tried de novo in any court." *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir.1992); *cf.* Restatement (Second) of Judgments § 84(4) (1982) ("If the terms of an agreement to arbitrate limit the binding effect of the award in another adjudication or arbitration proceeding, the extent to which the award has conclusive effect is determined in accordance with that limitation.").

Under the Accords, then, the Court may not revisit the Claims Tribunal's conclusion that no expropriation occurred as of January 19, 1981, nor may it reconsider the factual basis for

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[6] The President had the authority to require U.S. nationals to submit such claims for arbitration, and to agree that decisions of the Claims Tribunal would be final and binding on the parties. *Dames & Moore v. Regan*, 453 U.S. 654, 679, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).

the Claims Tribunal's conclusion.[7] *See Greenbaum v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1361 (11th Cir.1985) (relitigation of "all of the factual determinations which were necessary and critical to the arbitration panel's ultimate award" is precluded). In addition, the Court may not take issue with the legal principles applied by the Tribunal, Article V of the Claims Settlement Declaration states that the Tribunal "shall decide all cases on the basis of respect for law, applying such choice-of-law rules and principles of commercial and international law as *the Tribunal* determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances." (emphasis added).

Iran, however, urges the Court to give the Claims Tribunal's award even greater preclusive effect. It notes that the Tribunal mentioned post-cutoff everts in its ruling, and argues that the Court is bound by the Tribunal's findings concerning these events as well. Further, Iran argues that because the Tribunal heard essentially the same claims and the same evidence now before this Court, this Court is bound by its finding that no expropriation occurred in this case. Iran goes so far as to say that if this Court were to conclude that an expropriation occurred, the Court's ruling would violate the Algiers Accords by not giving proper deference to the Claims Tribunal's "final and binding" decision.

Iran's arguments are not persuasive. The Claims Tribunal itself recognized that it could only decide whether an

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[7] In addition, the doctrines of issue preclusion and claim preclusion forbid the Court from revisiting these questions. *See* 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* §§ 4406-4416.

expropriation had occurred as of January 19, 1981, defining its mission as solely "to evaluate the rights [McKesson] had in Pak Dairy in the period prior to the alleged expropriation; the extent to which these rights were diminished or interfered with prior to 19 January 1981; and, finally, whether such interference amounts in law to an expropriation giving rise to a right to compensation." Tribunal Award at 28. To the limited extent the Tribunal mentioned post-cutoff events,[8] it did so in order to evaluate whether an expropriation had occurred as of January 19, 1981. This Court clearly is not bound by the Tribunal's decisions or observations with respect to "matters not consigned to [its] discretion by the arbitration agreement." *Williams v, E.F. Hutton & Co., Inc.*, 753 F.2d 117, 119 (D.C.Cir.1985). And certainly the Court shall not treat the Tribunal's award as settling the question of whether an expropriation occurred *after* the cutoff date. The Claims Tribunal did not purport to be deciding that question, nor did it have the jurisdiction to do so.[9] It is *this* Court's responsibility to examine the post-cutoff events before it, and to determine whether an expropriation of McKesson's equity interest in Pak Dairy has occurred after January 19, 1981.

Of course, in its consideration of whether an expropriation occurred after the cutoff date, the Court may

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[8] The Tribunal, for example, noted that McKesson withdrew its two representatives from Pak Dairy's board in October of 1981, and determined that their departure from Iran "contributed to the diminution of the enjoyment of [McKesson's] rights, [but] did not affect their fundamental nature." Tribunal Award at 31.

[9] Indeed, the Tribunal made no findings whatsoever concerning Pak Dairy's alleged failure to pay dividends to McKesson after January 19, 1981.

consider events occurring before that date, as determined by the Claims Tribunal. In other words, accepting the Tribunal's view that evidence of an expropriation was "finely balanced" on its jurisdictional cutoff date, the Court shall consider the entire record (including post-cutoff events) to analyze whether the interference with McKesson's rights has ripened into an expropriation since that date. *See* Amicus Brief of the United States at 12 ("Because McKesson alleges a creeping expropriation, this Court may rely in part on the pre-1981 events in determining whether a post-January 1981 expropriation of property occurred, but must accept the Tribunal's determinations with regard to those facts.").

2. *Jurisdiction over McKesson's Claim for Denial of Dividends*

Perhaps the most significant post-cutoff events before the Court are Pak Dairy's alleged failure to pay dividends to McKesson in 1981 and 1982. Iran asserts that the Court may not consider the post-cutoff denial of dividends to McKesson in its analysis because the court of appeals has "ruled" that this Court lacks jurisdiction over that claim.

District courts lack subject matter jurisdiction over civil claims against a foreign state unless one of the FSIA's exceptions to immunity applies. *See McKesson I*, 905 F.2d at 442:28 U.S.C. §§ 1330(a). In this case, the Court determined that Iran lacked sovereign immunity under the third clause of 28 U.S.C. § 1605(a)(2), which deprives a foreign sovereign of immunity for actions based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." Affirming the Court's conclusion, the court of appeals found that "[t]he alleged effects of freezing- out American corporations in their ownership of Pak Dairy are at

least as substantial and direct as effects alleged in prior cases in which this court and other circuits have found 'direct effects'." *McKesson I*, 905 F.2d at 451. The *McKesson I* Court did not address whether the denial of dividends to McKesson constituted such a "direct effect."[10]

On the second interlocutory appeal, Iran raised the"direct effects" issue again, claiming that an intervening Supreme Court case, *Republic of Argentina v. Weltover*, had changed the law concerning this issue, 504 U.S. 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). In *McKesson II*, the court of appeals agreed that *Weltover* had changed the law, but not in a way that mattered in this case. The court of appeals, then, characterized its previous "direct effects" ruling as the law of the case, and refused to disturb its earlier finding. *McKesson II*, 52 F.3d at 351.

In its discussion of the "direct effects" issue, the McKesson II Court dropped the following footnote:

> Relying on *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1146-47 (D.C.Cir.1994) [, a case decided after *McKesson I*,] Iran claims that Pak Dairy's cash dividends were payable in

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[10] The court of appeals found that the following acts caused a direct effect in the United States:

> the constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran to support the operation of Pak dairy came to a halt; and McKesson's role as an active investor ceased when the dairy's new directors, illegally installed according to McKesson, cut off all of the dairy's existing commercial ties with McKesson in the United States.

> Iran, not in the United States, and for that reason McKesson's failure to receive these dividends cannot be considered a § 1605(a)(2) "direct effect in the United States." But our earlier decision is controlling and it did not mention, as a direct effect, Pak Dairy's failure to pay cash dividends to McKesson.

Id. at 351 n. 9. Iran characterizes this footnote as a "ruling" that this Court has no jurisdiction over McKesson's denial of dividends claim because that event does not have a sufficient "direct effect" in the United States.[11]

It is no such thing. In *Foremost I,* for whatever reason, the court of appeals did not mention the denial of dividends to McKesson in its list of actions causing a "direct effect" in the United States. In *Foremost II,* the court of appeals declined to address the question of the denial of dividends, finding that its original opinion had settled the matter. Neither opinion addressed the question of whether denial of dividends might constitute a "direct effect" in the United States. As such, notwithstanding Iran's arguments to the contrary, neither opinion resolved the dividend question in Iran's favor. Iran made the same argument it is making here before the *McKesson II* Court, and that Court rejected it, treating the issue as settled. This Court shall treat the issue as settled as well.

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[11] The legal underpinning of Iran's argument is that a cause of action under the commercial activities exception to the FSIA must be based on the very acts that produce the direct effect. *See Saudi Arabia v. Nelson,* 507 U.S. 349, 357, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) (when an action is "based on" commercial activity under the FSIA, such commercial activity must consist of the elements of the plaintiff's claim).

In any case, the Court disagrees with Iran's legal argument concerning the "direct effect" issue. In *Goodman Holdings*, the case on which Iran relies, two Irish corporations sought to recover payments for merchandise sold to government corporations under letters of credit issued in their favorby Iraqi banks that were branches of the Iraqi Government. 26 F.3d 1143, 1144 (D.C.Cir.1994). The D.C. Circuit affirmed the district court's conclusion that the "direct effects" exception did not apply, and affirmed the district court's finding that the Iraqi bank defendants were immune from suit under the FSIA. Noting that an effect is direct "if it follows as an immediate consequence of the defendant's activity," *id.* at 1146 (quoting *Weltover*, 112 S.Ct at 2168), the court of appeals-found that the Iraqi banks' failure to honor the letters of credit did not amount to a "direct effect" in the United States because "[n]either New York nor any other United States location was designated as the 'place of performance' where money was 'supposed' to have been paid...." *Id.* at 1146-47.

It makes sense that the "place of performance" was crucial in the *Goodman Holdings* case, because that factor represented the transaction's only link to the United States. Unlike the Irish corporations in *Goodman Holdings*, however, McKesson is an American corporation. Iran's discontinuing the dividend payments to McKesson (wherever they were payable) had a direct effect on McKesson in the United States.[12] *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1111-12 (5th Cir.1985) (because plaintiffs were located in the United States.

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[12] The Court notes that, before *Goodman Holdings* was decided, it had already ruled that the discontinuance of dividends had a sufficient direct effect in the United States. *McKesson Corp. v. Islamic Republic of Iran*, No. 82-220, Mem. Op. (D.D.C. August 23, 1993) ("1993 Opinion") at 55.

defendant's breach of contract had a direct effect on them in the United States).

The Court may, and shall, consider the alleged post-cutoff denial of dividends in its analysis.

3. *Principal-Agent Relationship*

The Court has made extensive factual findings and determined that a principal- agent relationship existed between Iran and its codefendant agencies and instrumentalities. *See generally* 1993 Opinion. The court of appeals reviewed the "extensive findings the district court issued on remand," and determined that this Court's findings were "well-supported." *McKesson II,* 52 F.3d at 351.

Iran argues that the Court's earlier determination of agency is not binding now. This is so, Iran asserts, because the Court's earlier determination was made when denying Iran's motion to dismiss on jurisdictional grounds. This fact, according to Iran has two important consequences. First, Iran claims that the Court found agency for jurisdictional purposes only, not for purposes of liability. Second, Iran stresses that the Court drew factual inferences in favor of McKesson when deciding the question of agency and argues that such inferences must now be resolved in favor of it, the non-moving party, at this stage of the litigation.

As a technical matter, Iran is correct: because the Court decided the agency question in a different procedural context, the Court shall not consider itself *bound* by its earlier analysis. However, Iran has given the Court no persuasive reason to reach a different conclusion now. Iran has not introduced any factors which the Court did not consider in its earlier analysis or demonstrated that there is a genuine dispute over the factors the

Court did consider.[13] Thus, even if Iran is correct that the "quantum of proof required to establish jurisdiction is different from the quantum of proof required to establish liability," Iran has not convinced the Court that this difference creates a genuine issue of material fact which would preclude summary judgment on the issue of agency now. *See McKesson II* at 351-52 (finding "more than enough evidence" in the Court's "comprehensive decision" supporting the finding of agency).

The Court need not repeat its detailed findings regarding agency here. The Court has reviewed the record, and finds, for substantially the same reasons stated in the 1993 Opinion, that McKesson is entitled to summary judgment on the issue of agency.[14] *See Matsushita Elec. Industrial Co. v. Zenith Radio,*

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[13] Iran is not correct that all inferences must be drawn in its favor at this stage of the litigation; all that is required is that the Court draw *reasonable* inferences in its favor. *National Souvenir Center v. Historic Figures, Inc.*, 728 F.2d 503, 512 (D.C.Cir.1984). Iran has identified no portion of the Court's earlier analysis which, when drawing such a reasonable inference in its favor, would constitute a genuine question of material fact precluding summary judgment on the question of agency. Also, it is not enough for Iran to allege, vaguely, that the Court drew inferences throughout its earlier opinion which would not be appropriate when ruling on McKesson's motion for summary judgment. A party opposing a motion for summary judgment "must set forth *specific* facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Iran has not done so here.

[14] The Court finds that Iran has presented no credible evidence that this agency relationship changed after 1980. Iran has introduced the affidavits of Masoud Pezeshk and Moshcan Mashkour, stating that the government has no role in the administration of Pak Dairy. But the Court has already noted that "Mr. Mashkour's and Mr. Pezeshk's statements do not rebut the finding of a principal/agent relationship." 1993 Opinion at 51. Although Mr. Mashkour has submitted an

475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (when "the record taken as a whole [cannot] lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial' "). Iran is responsible for the acts of its codefendants for purposes of McKesson's motion.

C. The Evidence

The Court shall review the evidence below.

1. *Events before January, 19, 1981*

Pak Dairy, a joint venture company between McKesson and private Iranian citizens, was incorporated on March 12, 1960. McKesson's ownership interest in Pak Dairy, initially 50 percent, fluctuated over the next twenty years. As of 1979, McKesson owned 31 percent of Pak Dairy.

As of December 1979, the following organizations jointly controlled approximately 52 percent of the shares of Pak Dairy: the Foundation for the Oppressed, the Financial Organization for the Expansion of Ownership of Industrial Units, the Industries and Mines Bank and the National Investment Company of Iran. In December of 1981, these

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additional affidavit which was not before the Court in 1993, the Court is not persuaded to reverse its earlier conclusion. Finally, Iran has submitted the affidavit of Alireaza Dadyar, the head of Pak Dairy's Accounts Section, which states that he has been unable to find any document in Pak Dairy's files suggesting that Iran ordered Pak Dairy to withhold dividends or shareholder communications from McKesson. But this fact is hardly sufficient to preclude summary judgment, given this Court's extensive review of the record and conclusions regarding agency. See 1993 Opinion.

organizations still controlled at least 52 percent of Pak Dairy's shares. As explained above and in the Court's 1993 Opinion, these organizations acted as agents of Iran with respect to the pertinent events of this litigation. Accordingly, Iran, acting through these organizations, controlled the board of directors of Pak Dairy after 1979.

Before the Islamic Revolution took place in 1979, Pak Dairy declared and paid dividends which were distributed to all shareholders, including McKesson.[15] On April 15, 1979, however, Pak Dairy declared a cash dividend for the year 1978 which was paid to the Iranian shareholders, but not to McKesson.

At a March 1980 meeting of Pak Dairy's board of directors, representatives of the Financial Organization stated that payments to "foreign shareholders" should be kept to a minimum. In April 1980, the chairman of Pak Dairy's board of directors resigned apparently as a result of the decision to pay dividends to McKesson. Subsequently, a shareholders meeting took place on April 14, 1980 at which the following occurred:

> A representative of [the National Investment Company of Iran], in a remark revealing a government agenda, stated that with regard "to the prohibition of payment to foreigners," NIC1 agreed with the payment of 10% net cash dividend and 10% stock dividend. Cash and

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[15] Pak Dairy's Articles of Association provide that "distribution of at least 10% of the annual profit is obligatory" and that "dividends shall be paid within four months after resolution of general meeting."

> stock dividends were approved at this meeting. Iranian shareholders received dividends. Although McKesson requested its dividend, it did not receive it. Ms. Asghari, in a telex dated May 27, 1980, replied that "due to decision and instruction of the board of directors," Pak Dairy could not pay any money "for any reason to foreign shareholders."

1993 Opinion at 38-39. On April 15, 1980, Pak Dairy declared a cash dividend and a stock dividend for the year 1979. Again, these dividends were paid to Pak Dairy's Iranian shareholders, but not to McKesson.

On May 21, 1980, McKesson wrote to Pak Dairy, asking that the amount of the dividends payable to it be placed in a bank account in McKesson's name. Pak Dairy's managing director responded, on May 27, 1980, that

> I have to inform you that due to decision and instruction of the board of directors, Pak Dairy can not pay any sums of money for any reason to foreign share holders. So I cannot take any action regarding your request.

In the proceedings before the Claims Tribunal, Pak Dairy asserted that this communication was unauthorized, but the Claims Tribunal noted that it was "in fact never specifically retracted." Tribunal Award at 26.

In addition to denying dividends to McKesson, Iran's representatives also dismissed a McKesson employee from Pak Dairy's board of directors in 1980, and ruled McKesson's proxies to be invalid for purposes of voting at a Pak Dairy shareholders meeting. Pak Dairy also failed to meet its

contractual obligations to McKesson.[16] Finally, Pak Dairy's board of directors also ordered that the accounts and financial statements of Pak Dairy should no longer be prepared in English, and that the company should not correspond with or send reports to U.S. citizens, including McKesson.

The Court shall pause here to examine the Claims Tribunal's assessment of the pre-cutoff evidence; that assessment, as explained above, is binding on the Court. The Claims Tribunal found that "[t]he only significant act on the part of Pak Dairy's controlling organs which appears to have been done with the object of discriminating against [McKesson] was the withholding of declared cash dividends for two successive years [in April 1979 and April 1980]." Tribunal Award at 29. It went on to conclude that this withholding of dividends was a "clear breach" of Pak Dairy's "duty" to "pay declared dividends to all its shareholders." *Id.* It further found that Iran was responsible for these discriminatory actions against McKesson. *Id.* at 30. ("[T]he ultimate responsibility for the withholding of dividends rests with the Iranian Government. The fact that the Pak Dairy Board members sought approval from their agency heads before acting").

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[16] In a handwritten notation in the board of directors meeting minutes of November 15, 1979, the Managing Director of the Financial Organization stated that "all foreign contracts of the company must be reconsidered, and are not valid in my opinion, and any payment in this connection shall be illegal." At a board of directors meeting held on December 5, 1979, the Managing Director stated that no payments should be made on the foreign contracts of Pak Dairy. Indeed, such payments were not made, and the Claims Tribunal determined that Pak Dairy had breached its obligations to McKesson under a contract relating to its lease of milk carton filling machines to Pak Dairy. *See* Tribunal Award at 35-40.

However, the Claims Tribunal stressed that as of May 1980, McKesson still owned 31 percent of Pak's Dairy's shares, still had two seats on Pak Dairy's board of directors, and was able to exercise its shareholder rights in a limited capacity. Tribunal Award at 26-7 (noting that one of McKesson's representatives--then its sole representative on the board of directors--had participated in management by submitting reports as to the selection of personnel).

According to the Claims Tribunal, when "set against the background of [McKesson's] continued, albeit circumscribed, participation in the affairs of the company," the denial of dividends for two years did not amount to an expropriation of McKesson's interest in Pak Dairy. *Id.* at 29-31. Given "the totality of the evidence" before it, the Claims Tribunal concluded that the interference with McKesson's rights had not amounted to an expropriation as of January 19, 1981.

2. *Events after January 19, 1981*

In April of 1981, after the Claims Tribunal's jurisdictional cutoff date, Pak Dairy again declared a cash dividend for the year 1980, and paid that dividend to its Iranian shareholders but not to McKesson. In April of 1982, Pak Dairy declared a cash dividend for the year 1981, and paid it to its Iranian shareholders, but not to McKesson. Pak Dairy has declared cash dividends in subsequent years as well which were paid to its Iranian shareholders bit not to McKesson. In addition, McKesson has received no stock dividends as a shareholder, including the stock certificates for a stock dividend declared in 1980 which the Claim Tribunal assumed that Pak Dairy would "promptly deliver" to McKesson. See Tribunal Award at 35.

On October 23, 1981, McKesson sent a telex to Pak

Dairy withdrawing the representative status of its two remaining representatives on the board. That telex also requested that copies of all future minutes of board of directors or shareholders meetings and of all financial reports be sent to McKesson's Law Department in the United States. Although Pak Dairy normally sends these materials to its shareholders, it did not comply with McKessen's request. With the exception of a December 28, 1991 telex advising of a general meeting of the shareholders, McKesson has received no materials directed to Pak Dairy shareholders since October 1981.

Since October 23, 1981, McKesson has not participated in the business affairs of Pak Dairy, nor has it been compensated for its investment in Pak Dairy.

3. *Analysis*

Pursuant to Federal Rule of Civil Procedure 56, McKesson seeks summary judgment on the issue of Iran's liability. Under Rule 56, a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Cov.P. 56(c). A party opposing a motion for summary judgment "may not rest upon the mere allegation or denials of the adverse party's pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Unless the opposing party points to "affirmative evidence" showing disputed material facts, the court shall enter summary judgment, if appropriate, against the adverse party. *Anderson v. Liberty Lobby,* 477 U.S. 242, 256-67, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Addickes v. S.H. Kress & Co.,* 398 U.S.

144, 160, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). When considering the evidence before it, the Court must draw reasonable inferences in favor of the adverse party. *See National Souvenir Center v. Historic Figures, Inc.*, 728 F.2d 503, 512 (D.C.Cir.1984).

a. *Denial of Dividends*

Iran does not dispute that McKesson did not receive dividends after the Claims Tribunal's jurisdictional cutoff.[17] However, it claims that there is a good reason for this: Iran was willing to pay the dividends, but did not do so because McKesson did not send an authorized representative to Pak Dairy in Tehran to claim them, in compliance with the requirements of Iranian law and Pak Dairy's Articles of Association. Iran claims, in other words, that it cannot be held responsible for its failure to pay dividends to McKesson because it was never legally required to do so.

McKesson denies the existence of such a requirement, correctly pointing out that Pak Dairy's Articles of Association do not specifically provide for it, Article 57 of the Articles of Association states that "should the general meeting pass no resolution regarding the mode of payment of dividends, the

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[17] Iran submits that there is a genuine question of material fact regarding whether the refusal to pay these dividends was sovereign or commercial activity for liability purposes. However, this Court has already determined that the acts at issue here are commercial in nature, reasoning that Iran never issued a formal declaration nationalizing Pak Dairy, and emphasizing that McKesson's claims are akin to a corporate dispute between majority and minority shareholders. The court of appeals affirmed this conclusion. *McKesson I*, 905 F.2d at 449-50; *see also McKesson II*, 52 F.3d at 349 n. 7.

board of directors may determine the mode of payment." Iran has submitted the following English translation of the original Farsi minutes of a Pak Dairy board meeting on October 26. 1981: "It was also decided to credit the dividend of foreign shareholders, like the previous years, to their account until they come to the company to collect it." McKesson disputes the accuracy of this translation, arguing that the Farsi is correctly translated as follows: "The dividends of the foreign shareholders shall be credited to their accounts as in the prior years until such a time *when they contact the organization [for clearance].*" [18]

It would not be appropriate for the Court to resolve the meaning of the disputed Farsi term when ruling on the parties' summary judgment motions. However, given the entire record in this case, the Court finds that the parties' disagreement on this point does not constitute a genuine issue of material fact which would preclude summary judgment.[19] Even if there were a procedural requirement for McKesson to "come to the

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[18] If McKesson's translation is correct, McKesson has satisfied the requirement of contacting Pak Dairy regarding its dividends; the minutes of a Pak Dairy board meeting held on April 29, 1981 refer to "a letter from Mr. Vahdati, the representative of foreign shareholders, demanding payment of the dividends and prize shares of the said shareholders."

[19] The affidavits of Iran's experts indicating that it was the custom or practice in Iran to require shareholders to come to the company to collect their dividends does not create a genuine issue of material fact either: custom or practice is not equivalent to a legal *requirement. See, e.g.*, Fakhari Affidavit at ¶ 15 ("The common practice for receiving the dividends in joint stock companies in Iran, including Pak Dairy, is such that a shareholder or his legal representative goes to the company and receives against receipt a cheque in the amount of the due dividends.").

company" to claim its dividends, it is not disputed that McKesson never knew about it. The notion that fifteen years of litigation--before this Court, the D.C. Circuit, the Claims Tribunal and the United States Supreme Court--could have been avoided if McKesson had followed a procedural requirement it didn't know about is simply absurd.

Also, even giving Iran the reasonable inferences to which it is entitled, it appears that it would have been futile for McKesson to have sent an authorized representative to Tehran to claim its dividends and shareholder communications. As the Claims Tribunal noted, Pak Dairy's telex dated May 27, 1980 stating that Pak Dairy "can not pay any sums of money for any reason to foreign share holders" was "never specifically retracted."[20] Tribunal Award at 26.

Iran raises the similar argument that the dividends were "credited" on Pak Dairy's books, and McKesson failed to request payment of those dividends in accordance with the rules and provisions of Pak Dairy's Articles of Association. But the Articles of Association do not require a shareholder to request its dividend payments in any particular way; rather, they simply provide that the distribution of at least 10% of the annual profit among shareholders is obligatory. Furthermore, the Court has already rejected this argument:

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[20] Iran's motion for summary judgment is based primarily on McKesson's failure to follow the procedural requirements described above, as well as on its argument that there are insufficient "direct effects" in this case to justify the Court's jurisdiction. For the reasons given above, the Court shall reject these arguments and deny Iran's motion.

> The Claims Tribunal apparently rejected [Iran's argument that crediting the dividends on Pak Dairy's books satisfied Pak Dairy's corporate obligations] in finding that Iran was liable for Pak Dairy's clear breach of duty in failing to pay the two dividends. In addition, Mr. Pezeshk does not state what McKesson would need to do to receive the dividends; as McKesson observes, surely this litigation would not be ongoing merely because McKesson failed to observe some procedural requirement.

1993 Opinion at 50-51.

b. *McKesson's Motivation*

It is Iran's theory that by October 1981 McKesson no longer *wanted* its dividends, because it believed that receiving such dividends would jeopardize its chances for success before the Claims Tribunal. Iran points out that McKesson did not accept its offer to negotiate a settlement in 1981.[21] In addition, Iran argues that nobody forced McKesson to withdraw its final representatives from Pak Dairy's board of directors; McKesson did so voluntarily. Under these circumstances, Iran submits, it would be inappropriate for the Court to enter summary judgment in McKesson's favor.

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[21] In a telex to McKesson dated November 11, 1981, Pak Dairy wrote: As regards the payment of your dividend, this company has repeatedly announced its readiness for taking proper measures but you have not taken appropriate action in this regard. If you really mean to settle this issue, you can introduce your plenipotentiary representative to us so that necessary steps may be taken according to the current regulations.

The Court disagrees that this evidence poses a barrier to summary judgment. The fact that McKesson was not willing to negotiate is inconsequential, McKesson was under no legal obligation to settle for less than the amount to which it was entitled as a shareholder. And given the extent to which McKesson's shareholder rights had been interfered with by October 23, 1981--the date McKesson sent the telex withdrawing its representatives--the Court need not resolve the disputed question of McKesson's "intent" in doing so.

c. *Expropriation*

The Claims Tribunal found that evidence of an expropriation was "finely balanced" as of January 19, 1981. Tribunal Award at 29. The Tribunal found that Pak Dairy's "controlling organs" had withheld cash dividends declared in 1979 and 1980 from McKesson, and that they had done so "with the object of discriminating against [McKesson]." *Id.* The Tribunal further found that this withholding of dividends "constituted a serious infringement of [McKesson's] right to enjoy the fruits of its holding in Pak Dairy," and that it "can be attributed beyond doubt to the State." The Tribunal noted in its 1986 Award that "[i]n the light of Pak Dairy's repeated assurances that [McKesson's] rights of ownership subsist, the Tribunal assumes that Pak Dairy will promptly deliver to [McKesson] the stock certificates for the stock dividend declared in 1980." It is undisputed that McKesson never received these stock certificates.

Prior to the Islamic Revolution, there was a "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging between the United States and Iran to support the operation of Pak Dairy."*See McKesson II,* 52 F.3d at 350. This flow stopped after the new regime gained control of Pak Dairy's board of

directors. *Id.*

After the Claims Tribunal's jurisdictional cutoff, Pak Dairy declared cash dividends in 1981 and 1982 which it paid to Iranian shareholders but not to McKesson. As further explained above and in the Court's 1993 Opinion, the government of Iran controlled Pak Dairy's board of directors during this time.

Further, McKesson sent a telex to Pak Dairy on October 23, 1981 which withdrew its representatives from Pak Dairy's board and requested that shareholder communications be sent to its Law Department in the United States. With one limited exception noted above, Pak Dairy did not comply with this request.

Given the Claims Tribunal's binding determination that the evidence of an expropriation was "finely balanced" as of January 19, 1981, there is no question in the Court's mind that the interference with McKesson's shareholder rights ripened into an expropriation after that date. The Court finds that the "more or less irreversible deprivation" of McKesson's property, see Tribunal Award at 29, constituting an expropriation occurred by April of 1982. By that time, McKesson had not received its dividends for a fourth consecutive year, McKesson had no voice in the management of the company since October of 1981, and McKesson had received no shareholder communications from Pak Dairy since it had requested them to be sent in October of 1981.[22] By that time, it is absolutely clear

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[22] It is true that McKesson continued to hold approximately 31% of the shares of Pak Dairy in April of 1982. Because expropriation is possible even when formal ownership of the shares is maintained, *see* Tribunal Award at 22, this fact is not material to the issue of liability. Indeed, Judge Howard Holzmann, the arbitrator who dissented from the

that "there is no immediate prospect that [McKesson] [was] able to resume the enjoyment of [its] property." See Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, reprinted in 55 Am. J. Int'l L. 545, 553 (1961).

The Court notes that it has considerable discretion "to determine what period of interference is unreasonable and when the taking therefore ceases to be temporary." *Id.* Accordingly, the Court is not bound by the October 1981 date alleged in the plaintiffs' Amended Complaint.

C. *The Legal Basis for McKesson's Claims*

Iran argues that McKesson lacks any legal basis for its claims in United States courts. As further explained below, the Court finds that McKesson may recover under the Treaty of Amity between the United States and Iran or under customary international law.[23]

1. *Treaty of Amity*

In an opinion filed on April 18, 1989, this Court

Claims Tribunal's finding that no expropriation had occurred, observed that McKesson's share certificates had "become mere pieces of paper, of interest only to scriptophilists--the hobbyists who collect financially worthless share certificates for their historical or decorative value." *Id.*, Dissenting Opinion at 6-7.

[23] The parties have briefed the applicability of Iranian law here. However, because the Court concludes that McKesson has alternative causes of action under the Treaty of Amity and customary international law, the Court need not address whether McKesson is entitled to relief under Iranian law.

specifically reserved for further briefing the question of whether the Treaty of Amity confers on McKesson a private right of action against Iran in United States courts. The time has come for the Court to resolve that question.

Treaties made by the United States are the law of the land. U.S. Constitution, Art. VI. In order to serve as a basis for a private lawsuit, however, a treaty must be implemented by appropriate legislation or be "self- executing"--that is, providing a private cause of action on its own terms, whether explicitly or implicitly. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C.Cir.1984) (Bork, J., concurring); *Frolova v. Union of Soviet Socialist Republics;* 761 F.2d 370, 373 (7th Cir.1985); *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir.1976). To determine if a given treaty is self-executing, courts must "look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution." *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C.Cir.1976); *Cardenas v. Smith*, 733 F.2d 909, 918 (D.C.Cir.19). Finally, "[i]n general, agreements that can be readily given effect by executive or judicial bodies, federal or States, without further legislation, are deemed self-executing, unless a contrary intention is manifest." Restatement (Third) of the Foreign Relations Law of the United States (1987) § 111, Reporters' Note 5 at 54; *see also Rainbow Navigation, Inc. v. Department of the Navy*, 686 F.Supp. 354, 357 (D.D.C.1988) (applying presumption that a treaty is self-executing unless contrary intention is expressed).

Iran and the United States are parties to the bilateral Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran (the "Treaty of Amity"), which became effective on June 16, 1957. 8 U.S.T. 899, T.I.A.S 3853, 284 U.N.T.S. 93. The Treaty of Amity,

which is still in effect, is one of a series of Treaties of Friendship, Commerce, and Navigation ("FCN Treaties") negotiated between the United States and other countries after World War II.

Article IV, paragraph 2 of the Treaty of Amity provides:

> Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation.
>
> Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof

Only one judge has decided whether this provision is self-executing. In *American Intern. Group v. Islamic Republic of Iran*, Judge Hart of this Court determined that it is 493 F.Supp. 522, 525 (D.D.C.1980). Judge Hart first noted that the "right of individuals and companies to enforce a private right of action in a United States court under the property protection provisions of [an FCN Treaty] has consistently been upheld." *Id.* (citations omitted). Judge Hart then concluded that the Treaty of Amity "clearly meets the criteria considered significant in determining whether a Treaty is self- executing and, therefore, capable of enforcement in a United States court." *Id.* Thus, Judge Hart concluded that the plaintiffs in the case before him, a group of insurance companies, could bring suit against

Iran under the Treaty of Amity. This ruling, however, has limited if any precedential value, because it was modified on other grounds by the D.C. Circuit. *See American Intern. Group v. Islamic Republic of Iran*, 657 F.2d 430 (D.C.Cir.1981).

With the exception of Judge Hart in *American Intern. Group*, no other judge appears to have tackled the question of whether an American national may sue a foreign national under a FCN Treaty in an American court. However, a long line of cases permits *foreign nationals* to bring suit in United States Courts against the United States for treaty violations. *See* Restatement (Third) of the Foreign Relations Law of the United States § 111, Reporters' Note 5 at 54 ("provisions in [FCN Treaties] conferring rights *on foreign nationals* ... have been given effect without any implementing legislation, their self-executing character assumed without discussion") (*emphasis added*).

Acknowledging these cases, Iran takes the position that only a foreign national would be entitled to raise a claim under the Treaty of Amity in a United States court. To support this position, Iran looks to the language of the treaty: "Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party." Iran interprets this language to "emphasize the protection that an investor is to receive from the foreign government, not his own government."

The Court disagrees with Iran's interpretation of the applicable language. The language of the Treaty only specifies that a party's property shall receive certain protection and security within the territory of the other party. The Treaty is silent about where such protections may be *enforced*. Further,

Iran offers no explanation found in the text of the Treaty as to why a foreign national, but not a United States national, should be able to assert its rights in a United States court.[31]

The Court shall examine the language and purposes of the Treaty of Amity as a whole, see, e. g. *More v. Intelcom Support Services, Inc.*, 960 F.2d 466, 469 (5th Cir.1992) to determine whether the Treaty is indeed self-executing. Article IV(2) is clearly designed to protect the property of U.S. nationals residing in Iran (as well as that of Iranian nationals residing in the United States). That provision sets forth rules for what constitutes an illegal taking ("[s]uch property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation") and describes the appropriate level of compensation for such a taking ("[s]uch compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken"). These specific rules articulate an intelligible, enforceable legal standard. *See Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961) (an 1881 treaty between the United States and Serbia conferred rights on Yugoslavian claimants even though the rights were "broadly stated" in the treaty). There is nothing in the Treaty to compel

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[31] Iran raises another argument as to why a United States national should not be permitted to sue a foreign sovereign in a United States court for violation of a FCN Treaty. Iran claims that with such a precedent on the books, Nicaraguans would be entitled to sue the United States in Nicaraguan courts under its FCN Treaty. Such a decision, Iran argues, would be "truly revolutionary." The Court finds that such an outcome is hardly likely. In order for the United States to be subject to suit in a foreign court for violation of a FCN Treaty, the foreign court would need to assert personal jurisdiction over the United States--not an easy task under most circumstances, because nearly all expropriations involve sovereign acts rather than commercial acts.

Iran's lopsided conclusion that only foreign nationals may bring suit under U.S. courts. And perhaps most significantly, there is nothing in the language of the Treaty to rebut the presumption that the treaty was intended to be self-executing, and therefore effective as domestic law. See Restatement (Third) of the Foreign Relations Law of the United States (1987) § 111, Reporters' Note 5 at 54.

Furthermore, if the Treaty of Amity were interpreted to forbid an American citizen from bringing suit in a United States court, McKesson would be forced to seek relief in the courts of Iran. This would be tantamount to no remedy at all: the post-revolutionary Iranian judicial system cannot afford an adequate remedy for U.S. citizens. See *Rockwell International Systems, Inc. v. Citibank NA*, 719 F.2d 583, 587-88 (2d Cir.1983).

Article IV, paragraph 2 of the Treaty of Amity provides that the property of United States nationals in Iran "shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation." The Court need not decide if Iran took McKesson's property for a public purpose. It is enough that Iran has failed to make prompt payment of just compensation to McKesson for its equity interest in Pak Dairy. Because the record is clear that Iran has indeed failed to compensate McKesson, Iran has violated the Treaty of Amity, and is liable for its violation in this Court.

2. *Customary International Law*

Customary international law is a part of the law of the United States, and must be ascertained and enforced by federal courts. *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900). According to the Restatement (Third) of the Foreign Relations Law of the United States, a state is

responsible under international law for injury resulting from a taking by the state of property that (1) is not for a public purpose, or (2) is discriminatory, or (3) is not accompanied by provision for just compensation. Restatement at § 712.

Iran disputes that the Restatement's formulation is recognized under customary international law. It quotes the United States Supreme Court's observation that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). However, this observation is not a binding legal holding; rather, it is a description of the Court's perception of the state of international law in 1964. And, according to the Restatement, the "controversy as to the state of customary law has been dormant" since 1974, with international tribunals consistently applying the Restatement standard to determine liability, and with states relying on bilateral agreements like the Treaty of Amity itself, which incorporates the Restatement standard. Restatement § 712 at 205-06.

Iran then turns to an unlikely source to prove that the Restatement's standard does not accurately describe international law: the Restatement itself, which acknowledges opposition (mostly among developing countries) to the standard it articulates. Even taking that opposition into account, the Restatement finds that its standard is an accurate reflection of international law, and notes that "international arbitral tribunals have consistently applied [it]." Restatement at § 712, Reporters' Notes at 206. The Court accepts the Restatement's characterization of this standard as an accurate reflection of

international law.[25] *See Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co., 822 F.2d 230, 237 (2d Cir.1987) (accepting the Restatement standard),* Phillips Petroleum Co. Iran v. Iran, 21 U.S.C.T.R. 106 (June 29, 1989) ("As the Tribunal has held in a number of cases, expropriation by or attributable to a State of the property of an alien gives rise under international law to liability for compensation, and this is so whether the expropriation is formal or de facto....").

Iran is liable under customary international law because its actions, aimed at McKesson, a foreign national, were clearly discriminatory. In addition, Iran neither offered nor provided any compensation to McKesson for its interest in Pak Dairy. *See Banco Nacional de Cuba,* 658 F.2d at 891 ("we believe that the failure to pay any compensation to the victim of an expropriation constitutes a violation of international law").

III. CONCLUSION

For the reasons stated above, the Court shall grant McKesson's Motion for Summary Judgment on the Issue of Liability, entering judgment in its favor on that issue, and deny

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[25] Iran claims that McKesson may not invoke the Restatement's standard of customary international law in this Court because McKesson has not first exhausted its remedies in Iranian courts. However, the requirement of exhaustion does not apply when such a remedy is clearly inadequate or "when the claim is for injury for which the respondent state firmly denies responsibility." Restatement § 713, Comment f at 219. Here it would clearly be futile for McKesson to pursue its claims in Iranian courts: as mentioned above, the post-revolutionary Iranian judicial system cannot afford an adequate remedy for U.S. citizens. *See Rockwell International Systems, Inc. v. Citibank N.A.,* 719 F.2d 583, 587-88 (2d Cir.1983). In addition, Iran firmly denies responsibility for the claims asserted by McKesson.

Iran's Motion for Summary Judgment. An appropriate Order accompanies this Opinion.

McKesson II, 52 F.3d at 350 (quoting *McKesson I,* 905 F.2d at 451) (internal quotations omitted).

/s/Thomas A. Flannery
Thomas A. Flannery
United States District Judge

APPENDIX H

FOREMOST-MCKESSON, INC., ET AL.,
Appellees

v.

THE ISLAMIC REPUBLIC OF IRAN,
Appellant

No. 89-7126

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

284 U.S. App. D.C. 333;
905 F.2d 438

January 22, 1990, Argued

June 15, 1990, Decided

PRIOR HISTORY:

Appeal from the United States District Court for the District of Columbia; Civil Action No. 82-0220.

COUNSEL:
Thomas G. Corcoran, Jr., with whom Henry M. Lloyd was on the brief, for Appellant.

Mark R. Joelson, with whom Mark N. Bravin was on the brief, for Appellees.

JUDGES:
Edwards, Circuit Judge, Robinson, Senior Circuit Judge, and Revercomb, * District Judge.

* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1988).

OPINIONBY:
EDWARDS

OPINION:

EDWARDS, Circuit Judge.

This interlocutory appeal involves a claim by a United States business that the appellant, Islamic Republic of Iran ("Iran"), acting through various codefendants who controlled the shares and the board of directors of a dairy company in Iran, used its majority position to lock the appellee out of the management of the dairy and to deny the appellee its share of the company's earnings. Iran claims that it is immune from suit under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), *28 U.S.C. § § 1330,* 1602-1611 (1988). Iran also contends that, because it lacks the constitutionally mandated minimum contacts with the forum, the District Court could not exercise *in personam* jurisdiction. Accordingly, Iran seeks reversal of the District Court's denial of its motion to dismiss.

The plaintiff-appellee companies are Foremost-McKesson, Inc., and its wholly owned subsidiaries Foremost Tehran, Inc., Foremost Shir, Inc., Foremost Iran Corporation. Foremost Foods, Inc. (individually and collectively "Foremost"), and the Overseas Private Investment Corporation ("OPIC"). In addition to responding to the issues raised by Iran, the plaintiff-appellees challenge the judgment of the District Court allowing Iran to amend its complaint to include the defenses of sovereign immunity and lack of personal jurisdiction under FSIA. Foremost also argues that, under the Treaty of Amity,[1] Iran waived its foreign sovereign immunity as to suits arising out of any commercial activity.

With respect to the claims concerning sovereign immunity, we are constrained to remand for further development of the record. Under FSIA, agencies and instrumentalities of a foreign nation are presumed to be separate from each other and from the foreign state. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 625-28, 77 L. Ed. 2d 46, 103 S. Ct. 2591 (1983).* It is not enough to show that various government entities or officials represent a majority of the shareholders or constitute a majority of the board of directors of the applicable agency or instrumentality; in other words, mere involvement by the state in the affairs of an agency or instrumentality does not answer the question whether the agency or instrumentality is controlled by the state for purposes of FSIA. The presumption of separateness (and whether it has been rebutted) affects the jurisdiction of the court, as well as the liability of the state, under FSIA: in order for the case to proceed under FSIA, the District Court must consider whether Iran so dominated the

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[1] *See* Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, *8 U.S.T. 899 (1957), reprinted in* Brief for Appellees, addendum at 37.

operations of the dairy "that a relationship of principal and agent is created." *Id. at 629.*

Although we affirm most of the holdings of the District Court,[2] we reject the legal test that it employed to determine Iran's claim to sovereign immunity. On remand, the District Court will be required to make more extensive preliminary findings regarding the nature and degree of control exerted by Iran over the dairy and its shareholders.[3] With regard to Iran's constitutional *in personam* ("minimum contacts") jurisdiction claim, we conclude that, because this issue was never raised below, the claim has been waived.

I. BACKGROUND

The procedural history of this case is unusually complicated. Foremost alleges that in 1959, at the request of a

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[2] *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, Civ. Action No. 82-0220 (D.D.C. Aug. 18, 1988) ("*Foremost I*"), *reprinted in* Appendix ("App.") 91; *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, Civ. Action No. 82-0220 (D.D.C. Nov. 8, 1988)("*Foremost II*"), *reprinted in* App. 101; *Foremost-McKesson, Inc. v. Islamic Republic of Iran, 1989 U.S. Dist. LEXIS 4055*, Civ. Action No. 82-0220 (D.D.C. Apr. 18, 1989) ("*Foremost III*"), *reprinted in* App. 3.

[3] We emphasize the procedural posture of our conclusions. We are not making a final determination whether jurisdiction exists under FSIA; nor are we making any final factual determinations. Rather, we are addressing whether the District Court properly denied Iran's motion to dismiss. In resolving this question, we base our judgment on the facts as alleged by the plaintiff and generously construed in the plaintiff's favor. *See Gilson v. Republic of Ireland, 221 U.S. App. D.C. 73, 682 F.2d 1022, 1026 (D.C.Cir. 1982); see also Transamerican S.S. Corp. v. Somali Democratic Republic, 247 U.S. App. D.C. 208, 767 F.2d 998, 1000 n. 1 (D.C.Cir. 1985).*

group of Iranian nationals, Foremost-McKesson, Inc., a Maryland corporation with its principal place of business in California, assisted in establishing a dairy, the Sherkat Sahami Labaniat Pasteurize Pak ("Pak Dairy"), in the Republic of Iran. From 1959 to 1979, Foremost provided the top management for the dairy and controlled its Board of Directors. During the period relevant in the instant case, Foremost held thirty-one percent of the equity interest in the dairy.

On January 22, 1982, Foremost and the Overseas Private Investment Corporation [4] filed a complaint in the District Court against Iran and several agencies and instrumentalities of Iran through which Foremost claims Iran acted. These agencies and instrumentalities included the Financial Organization for the Expansion of Ownership of Productive Units, the National Investment Company of Iran, Industrial and Mining Development Bank of Iran, the Foundation for the Oppressed and Pak Dairy. The complaint alleged that Iran, acting through the codefendant agencies and instrumentalities, illegally divested Foremost of its investment in Pak Dairy. Foremost and OPIC sought compensation for the entire value of their jointly held 19.84% insured equity interest in Pak Dairy,[5] allegedly valued at not less than $ 7,040,000, plus interest; compensation for their share in any dividends declared and not received before the alleged divestment of their equity interest; and various other damages, including attorneys' fees. *See* Complaint paras. 38-39, *reprinted in* Appendix ("App.") 36.

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[4] OPIC is an agency of the United States that insures private overseas investments of United States nationals.

[5] Foremost sought damages only for the insured portion of its shareholding: 64% of its 31% ownership or 19.84% of the total shares.

On June 29, 1982, Iran responded to the complaint in what it titled an "Answer to Complaint." *See* Answer to Complaint [hereinafter 1982 Answer], *reprinted in* App. 46. In this response, Iran did not state the defenses raised in its motion to dismiss and did not admit or deny Foremost's averments, *cf.* Fed.R.Civ.P. 8(b); rather, Iran contended that prosecution of the suit was barred by the so-called Algiers Accords of January 19, 1981,[6] and that, pursuant to Executive Order No. 12,294, *46 Fed.Reg. 14,111 (1981)* ("Executive Order"), the "complaint had no legal effect other than to toll the applicable statute of limitations." 1982 Answer at 1, *reprinted in* App. 46.[7] Pursuant to the terms of the Executive Order, the District Court took no action in this case while Foremost and OPIC presented their claims against Iran to the Iran-United States Claims Tribunal ("Claims Tribunal") in The Hague.

On April 10, 1986, the Claims Tribunal concluded that interference with Foremost's rights had not, by January 19, 1981, amounted to an expropriation. *See Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 Iran-United States Claims Trib. Rep. 228, 250, *reprinted in* App. 78.[8] However, the Claims

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[6] Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 Int'l L. Materials 224 (1981) [hereinafter Algiers Accords].

[7] The Executive Order provided that plaintiffs with claims arguably within the jurisdiction of the Claims Tribunal could file suit in federal court in order to toll the period of limitations for commencing the action. *See 46 Fed.Reg. at 14,111.* The Executive Order "purports only to 'suspend' the claims, not divest the federal court of 'jurisdiction.'" *Dames & Moore v. Regan, 453 U.S. 654, 684, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981).*

[8] A claim must have been "outstanding" on January 19, 1981, to fall within the jurisdiction of the Claims Tribunal. *See* Algiers Accords, *supra* note 6, at art. II, para. 1; *see also Foremost Tehran, Inc.*

Tribunal concluded that Pak Dairy had unlawfully withheld from Foremost cash dividends declared in 1979 and 1980, and it therefore awarded Foremost approximately $ 900,000, plus interest, against Iran. The Claims Tribunal also concluded that Pak Dairy unlawfully failed to deliver to Foremost stock certificates representing stock dividends declared in 1980 and that Pak Dairy had breached contractual obligations in failing to pay rental payments due and to return upon demand certain machines to Foremost. The Claims Tribunal awarded Foremost in excess of $ 500,000 in damages against Pak Dairy for the contract breaches. *See id.* at 257-58, *reprinted in* App. 88. Iran paid the amounts awarded out of the security account established at The Hague pursuant to the provisions of the Algiers Accords.

On April 1, 1988, the plaintiffs -- still seeking damages for claimed losses -- revived this lawsuit by filing a motion for partial summary judgment against Iran on the issue of liability. The plaintiffs alleged facts that arguably support a conclusion that the dairy was expropriated *after* the 1981 limit to the Claims Tribunal's jurisdiction. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran, 1989 U.S. Dist. LEXIS 4055,* Civ. Action No. 82-0220, slip op. at 2 (D.D.C. Apr. 18, 1989) *("Foremost III"), reprinted in* App. 4.[9]

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v. Iran, 10 Iran-United States Claims Trib. Rep. at 233 n. 5, *reprinted in* App. 54 n. 2. The parties apparently dispute whether the Claims Tribunal's determination in favor of Iran on the expropriation claim was based on the merits or on lack of jurisdiction. However, that issue is not before us in this appeal, and, accordingly, we do not address that issue.

[9] The Supreme Court explained in *Dames & Moore, 453 U.S. at 684-85,* that, "as we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will 'revive' and become judicially enforceable in United States courts."

In response to Foremost's reactivation of the suit, Iran moved to strike its 1982 Answer from the record and separately moved to stay the proceedings. The District Court denied both motions, but it denied the motion to strike without prejudice to a motion by Iran to file an amended answer. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, Civ. Action No. 82-0220, slip op. at 1 (D.D.C. Aug. 18, 1988) *("Foremost I"), reprinted in* App. 91. Iran then moved to amend its 1982 Answer and the District Court granted its motion. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, Civ. Action No. 82-0220, slip op. at 5 (D.D.C. Nov. 8, 1988) *("Foremost II"), reprinted in* App. 105. The District Court rejected Foremost's and OPIC's contentions that the court did not have authority to or, alternatively, could not, without abusing its discretion, permit Iran to assert certain jurisdictional defenses not included in the 1982 Answer. *Id.*

Concurrently, Iran filed a motion to dismiss the underlying complaint, pursuant to Rule 12(b)(1) and (2) of the Federal Rules of Civil Procedure, for lack of jurisdiction under FSIA. The District Court denied Iran's motion to dismiss. *See Foremost III*, Civ. Action No. 82-0220 (D.D.C. Apr. 18, 1989), *reprinted in* App. 3. Iran then filed this interlocutory appeal.

II. ANALYSIS

A. *Introduction*

The Foreign Sovereign Immunities Act connects the issue of subject matter jurisdiction to the issue of sovereign immunity. *See 28 U.S.C. § 1330*(a). District courts in a civil action against a foreign state, or the agency or instrumentality of a foreign state, lack subject matter jurisdiction unless one of the exceptions to immunity applies. *See 28 U.S.C. § § 1330*(a).

1605(a), 1607. Personal jurisdiction under FSIA exists so long as subject matter jurisdiction exists and service has been properly made pursuant to *28 U.S.C. § 1608. See 28 U.S.C. § 1330*(b). Thus, if none of the exceptions to sovereign immunity applies, district courts lack jurisdiction in suits against a foreign state, or an agency or instrumentality thereof.[10]

Iran and Foremost present numerous challenges to the District Court determinations bearing on both subject matter and personal jurisdiction under FSIA. At the center of the challenges is the question whether Iran is immune from suit under FSIA. In the analysis that follows, we first address the issue of the jurisdiction of *this* court to review the District Court's decisions on interlocutory appeal. We next consider whether the District Court properly permitted Iran to amend its 1982 Answer to include the defense of sovereign immunity. Third, we address Iran's claim that the District Court erred in attributing to Iran the actions of Pak Dairy and its majority shareholders, which are allegedly agencies or instrumentalities of Iran. Fourth, we consider whether the District Court erred in concluding that the actions attributed to Iran in the complaint were sufficiently commercial and the effects sufficiently "direct" -- pursuant to the commercial activity exception to sovereign immunity, *see 28 U.S.C. § 1605*(a)(2) -- to withstand Iran's motion to dismiss. Next we consider whether Iran waived its immunity by signing the Treaty of Amity. Finally, we address the claims regarding constitutional *in personam* ("minimum contacts") jurisdiction.

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[10] The *statutory* requirements for personal jurisdiction do not affect the constitutional *in personam* jurisdiction requirement that, pursuant to the due process clause of the Fifth Amendment, certain "minimum contacts" must exist between the person and the jurisdiction. *See, e.g., Gilson v. Republic of Ireland, 221 U.S. App. D.C. 73, 682 F.2d 1022, 1028 (D.C.Cir. 1982).*

B. *Interlocutory Appeal*

Neither party has challenged this court's authority to review the District Court's determinations on interlocutory appeal. Even where our jurisdiction is uncontested by the parties, however, we are constrained to act only within our jurisdictional authority. *See Tuck v. Pan American Health Organization, 215 U.S. App. D.C. 201, 668 F.2d 547, 549 (D.C.Cir. 1981)* ("Jurisdiction is, of necessity, the first issue for an Article III court. The federal courts are courts of limited jurisdiction, and they lack the power to presume the existence of jurisdiction in order to dispose of a case on any other grounds.").

In this case, we adhere to the law of this circuit, *see Transamerican S.S. Corp. v. Somali Democratic Republic, 247 U.S. App. D.C. 208, 767 F.2d 998, 1000 (D.C.Cir. 1985),* and other circuits as well, *see, e.g., Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic, 877 F.2d 574, 576 n. 2* (7th Cir.), *cert. denied, 493 U.S. 937, 110 S. Ct. 333, 107 L. Ed. 2d 322 (1989); Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 450-51 (6th Cir. 1988); Compania Mexicana de Aviacion, S.A. v. United States District Court, 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam); Reale Int'l, Inc. v. Federal Republic of Nigeria, 647 F.2d 330, 331 & n. 4 (2d Cir. 1981); Velidor v. L/P/G Benghazi, 653 F.2d 812, 816 (3d Cir. 1981), cert. dismissed, 455 U.S. 929, 102 S. Ct. 1297, 71 L. Ed. 2d 474 (1982),* in granting interlocutory appeal of the District Court's denial of the foreign state's motion to dismiss on grounds of sovereign immunity. Such an appeal comes within the ambit of the "collateral order doctrine" articulated in *Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949),* because, as the Seventh Circuit explained, "sovereign immunity is an immunity from trial

and the attendant burdens of litigation, and not just a defense to liability on the merits." *Rush-Presbyterian-St. Luke's Medical Center*, 877 F.2d at 576 n. 2.

C. *Amendment of the 1982 Answer to Include the Defense of Sovereign Immunity*

Foremost contends that the District Court erred in granting Iran's motion to amend its complaint to include the defense of sovereign immunity. Foremost argues that by filing the 1982 Answer without asserting the defense of sovereign immunity, Iran permanently waived its immunity "by implication," pursuant to *28 U.S.C. § 1605*(a)(1). We cannot agree.

Section 1605(a)(1) provides that a foreign sovereign is not "immune from the jurisdiction of courts of the United States ... in any case ... in which the foreign state has waived its immunity either explicitly or by implication." Foremost is correct in asserting that, in most instances, a state's failure to assert sovereign immunity in a responsive pleading will constitute a waiver of the defense. But the situation here is different because, in 1982, Iran did not respond substantively to any of the averments in the complaint or pose any defenses to the claims; instead, Iran merely argued that the action should proceed in another forum, which it then did. Iran's actions in these circumstances did not constitute an implied waiver.

It is true that the House Report accompanying FSIA provides that "an implicit waiver would ... include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." H.Rep. No. 1487, 94th Cong., 2d Sess. 18 (1976). We agree with the Seventh Circuit, however, that the example of an implied waiver

> given in the legislative history -- filing a responsive pleading without raising an immunity defense -- demonstrates that Congress anticipated, at a minimum, that waiver would not be found absent a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so.

Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 378 (7th Cir. 1985) (citation omitted). Iran's 1982 Answer does not exhibit such a conscious decision or opportunity.

The 1982 Answer does not admit or deny any of the averments upon which Foremost relied; nor does it state any defenses to the claims Foremost asserted. *Cf.* Fed.R.Civ.P. 8(b). Indeed, Iran explicitly stated in the 1982 Answer that "the action commenced by the filing of plaintiffs' complaint has no legal effect other than to toll the applicable statute of limitations" and that "no response to plaintiffs' complaint is required." 1982 Answer at 1, 2, *reprinted in* App. 46, 47. As though to dispel any doubt, Iran further stated that "the foregoing is without prejudice to any of defendant's rights against the United States or plaintiffs, either in this forum or before the Arbitral Tribunal." *Id.* at 2, *reprinted in* App. 47. While such statements would not, in most contexts, excuse the failure to assert a defense in a responsive pleading, the circumstances of this case are unusual because of the Executive Order. Iran contended, and Foremost conceded below, that Executive Order No. 12,294 did not even contemplate the filing of a responsive pleading in cases, like this one, that were referred to the Claims Tribunal under the Algiers Accords. *See Foremost I*, slip op. at 5 n. 6, *reprinted in* App. 95 & n. 6. We need not reach the issue whether the 1982 Answer is a responsive pleading for purposes of the Federal Rules of Civil

Procedure. In the unusual circumstances of this case, it is clear that Iran did not make a "conscious decision to take part in the litigation" before the District Court.

Application of the implied waiver provision in the instant case would be inconsistent with the substantial precedent construing the implied waiver provision narrowly. The legislative history of FSIA gives three examples of circumstances in which courts have found implied waivers: (1) a foreign state has agreed to arbitration in another country; (2) a foreign state has agreed that the law of a particular country governs a contract; or (3) a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity. *See* H.Rep. No. 1487, 94th Cong., 2d Sess. 18 (1976); SEN. REP. No. 1310, 94th Cong., 2d Sess. 18 (1976). In reviewing the case law bearing on the breadth of the implicit waiver provision, the Seventh Circuit noted that "cases involving arbitration clauses illustrate that provisions allegedly waiving sovereign immunity are narrowly construed" and that the narrow construction of the implicit waiver clause is also evident in "the line of cases holding that a contract's waiver of immunity does not apply to third parties not privy to the contract." *Frolova, 761 F.2d at 377; see also id.* at n. 10 (citing cases). The *Frolova* court further noted that, with regard to contract provisions, "courts rarely find that a nation has waived its sovereign immunity, particularly with respect to suits brought by third parties, without strong evidence that this is what the foreign state intended." *Id.* at 377.

In rejecting the plaintiff's contention that the foreign sovereign had implicitly waived its immunity by not defending the action, the Seventh Circuit further noted that the case law evidences a reticence to find a waiver from the nature of a foreign state's participation in litigation. For example, in *Castro v. Saudi Arabia*, 510 F. Supp. [309, 311-12 (W.D.Tex. 1980)], the court held that the defendant's failure to timely answer the

complaint did not waive sovereign immunity. And in *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A., 727 F.2d 274, 277-78 (2d Cir. 1984),* the court ruled that the district court did not err in finding that sovereign immunity was not waived, although the defendant never filed a responsive pleading but instead filed several motions which did not assert sovereign immunity, and a Rule 12(b)(1) motion to dismiss based on sovereign immunity was not filed until over two and one-half years after the complaint was filed.
Id. at 378.[11]

Finally, the mechanistic application of the implied waiver urged by Foremost would be inconsistent with the notions of "grace and comity" that underlie the statutory scheme. *See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486, 76 L. Ed. 2d 81, 103 S. Ct. 1962 (1983).* In effecting these underlying policy concerns, this court noted in *Practical Concepts* that "intolerant adherence to default judgments against foreign states could adversely affect this nation's relations with other nations and 'undermine the State Department's continuing efforts to encourage ... foreign sovereigns generally[] to resolve disputes within the United States' legal framework.'" *811 F.2d at 1551 n. 19* (quoting Brief for the United States as Amicus Curiae at 13-15). In this regard, the District Court "speculated that an intolerant elevation of form over substance in this case, by deeming Iran's original 'answer' to have waived the defense of sovereign immunity, will

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[11] In *Practical Concepts, Inc. v. Republic of Bolivia*, this court concluded that, even though Bolivia's telegram acknowledging receipt of process might be an "appearance" under Federal Rule of Civil Procedure 55(b)(2), it was not an "appearance" for purposes of FSIA so as to bar Bolivia's assertion of sovereign immunity for the first time in its objection to a default judgment. *258 U.S. App. D.C. 354, 811 F.2d 1543, 1546 & n.6 (D.C.Cir. 1987).*

almost certainly undermine the confidence of foreign states in the fairness of our legal system." *Foremost II*, slip op. at 18-19, *reprinted in* App. 118-19. We agree.

On the record before us, we conclude that the District Court properly permitted Iran to amend the 1982 Answer to include the defense of sovereign immunity.[12]

D. *Attributing Acts to the Sovereign*

Before proceeding to consider the various exceptions to sovereign immunity at issue in this case, we must first address Iran's attribution argument. In this suit, Foremost seeks to hold the foreign sovereign of Iran responsible for the actions of Pak Dairy and/or the entities holding the majority of Pak Dairy shares. Iran claims that the District Court erred in attributing to Iran the actions of the Board of Directors of Pak Dairy, even for purposes of jurisdiction. The District Court made few findings of its own regarding the degree of control exerted by Iran over Pak Dairy or over the shareholder-entities that Foremost alleges are government controlled, although Foremost tendered

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[12] We also find Foremost's assertion that the District Court abused its discretion in granting leave to amend completely devoid of merit. Rule 15(a) of the Federal Rules of Civil Procedure provides in relevant part that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). Such grant here certainly did not constitute an abuse of discretion. As the Supreme Court has explained, in the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given." *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962).

extensive affidavits in support of its position, *see, e.g.*, Affidavit of Leonard M. Patterson, Jr., *reprinted in* Brief for Appellees addendum at 1-16; Affidavit of Frank Fisher, *reprinted in* Brief for Appellees addendum at 17-36. Instead, the District Court concluded that the Claims Tribunal had decided in Foremost's favor an issue "sufficiently related to permit reliance on the Claims Tribunal's finding, ... at least at this stage in the proceedings. " *Foremost III*, slip op. at 6, *reprinted in* App. 8.

While we agree with the District Court that the issue is "whether the government of Iran exercised the necessary degree of control over the other defendants to create a principal/agent relationship and thus permit this court to deem Iran responsible for their actions," *id.*, we conclude that the question of attribution under FSIA is not, as the District Court concluded, the "same question, or at least a very similar" question, *id.*, to the one decided in Foremost's favor by the Claims Tribunal. Thus, we must remand to the District Court so that it may make further factual determinations in light of the more rigorous attribution standard required by FSIA. The Claims Tribunal's findings, without more, are not sufficient to answer the question posed by Iran's motion to dismiss for want of jurisdiction under FSIA.

1. The Legal Standard Under FSIA

FSIA applies to instrumentalities and agencies of the foreign sovereign, as well as to the state itself. *See 28 U.S.C. § 1603*(a), (b).[13] But instrumentalities and agencies are accorded

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[13] FSIA defines a "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *28* U.S.C. § 1603(a). An "agency or instrumentality of a foreign state" means any entity

(1) which is a separate legal person, corporate or otherwise, and

a presumption of independent status. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 626-27, 77 L. Ed. 2d 46, 103 S. Ct. 2591 (1983)* ("*Bancec*"). In *Bancec*, the Supreme Court applied this presumption in the liability context, considering the question whether a claim of a foreign agency was subject to set-off for the debts of its parent government. The *Bancec* Court explained that the presumption of juridical separateness may be overcome where "internationally recognized equitable principles" mandate attribution in order to avoid injustice, *id. at 633-34*, and suggested that the presumption would be overcome where "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created." *Id. at 629*. The House Report accompanying FSIA set forth the reasons for separating the liabilities of one state instrumentality from those of another or from those of the state. The House Report explained that "there are compelling reasons for" the presumption of separateness in *28 U.S.C. § 1610*(b):

> If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between

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(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of a State of the United States ... nor created under the laws of any third country.

28 U.S.C. § 1603(b).

> a U.S. corporation and its independent subsidiary.

H.Rep. No. 1487, 94th Cong., 2d Sess. 29-30 (1976); *Bancec, 462 U.S. at 628* (quoting same passage).

The presumption of the juridical separateness of entities also applies to jurisdictional issues. *See, e.g., Gilson v. Republic of Ireland, 221 U.S. App. D.C. 73, 682 F.2d 1022, 1029-30 (D.C.Cir. 1982); Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170, 176 (5th Cir. 1989).* As noted in the Restatement, "when a state instrumentality is not immune ..., for instance because the claim arises out of a commercial activity, the claim is *ordinarily to be brought only against the instrumentality*." 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 452 comment c (1987) (emphasis added). In *Gilson*, as here, the plaintiff brought an action against a foreign state, the Republic of Ireland and instrumentalities thereof, for a variety of alleged commercial misdeeds. *See 682 F.2d at 1024.* This court acknowledged that "'the activities of an agent may be attributed to the principal for jurisdictional purposes.'" *Id.* at 1026 n. 16 (quoting *East Europe Domestic Int'l Sales Corp. v. Terra, 467 F. Supp. 383, 390* (S.D.N.Y.), *aff'd mem., 610 F.2d 806 (2d Cir. 1979)); see also id.* at 1029-30. But the *Gilson* court concluded that the subject matter jurisdiction determination could not be made absent factual determinations regarding whether an agency relationship existed among the various defendants. *See id.* at 1026 n. 16, 1029. In other words, absent an agency relationship, the court lacks subject matter jurisdiction over the foreign state for the acts of its instrumentality. *See Hester Int'l Corp., 879 F.2d at 176, 181; see also Gilson, 682 F.2d at 1026 n. 16, 1029-30.* Hence, in the instant case, the District Court must determine whether the facts as alleged by Foremost -- subject, of course, to challenge by

Iran -- show sufficient control by Iran over Pak Dairy to create a relationship of principal to agent.

It is further clear that the *plaintiff* bears the burden of asserting facts sufficient to withstand a motion to dismiss regarding the agency relationship. *See Baglab Ltd. v. Johnson Matthey Bankers Ltd., 665 F. Supp. 289, 296-97 (S.D.N.Y. 1987); cf. Hester, 879 F.2d at 176* (plaintiff "bears the burden of proving the agency relationship" at trial); *Letelier v. Republic of Chile, 748 F.2d 790, 795 (2d Cir. 1984)* ("Plaintiffs had the burden of proving that [the state instrumentality] was not entitled to separate recognition"), *cert. denied, 471 U.S. 1125, 86 L. Ed. 2d 273, 105 S. Ct. 2656 (1985).* Thus, we cannot agree with Foremost that the findings of the Claims Tribunal alone are sufficient to address Iran's motion to dismiss for want of agency between Pak Dairy and Iran. The legal standards employed by the Claims Tribunal to determine liability under the Algiers Accords are not coterminous with the standards applicable to determine a claim of attribution under FSIA.

Under the Algiers Accords, Iran agreed by international compact to assume responsibility for compensating United States nationals not only for claims against Iran itself but also for claims against "any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof." *See* Algiers Accords, *supra* note 6, at art. VII para. 3. The Claims Tribunal held that "the two main indicators of government control of a corporation are the identity of its shareholders and the composition and behavior of its board of directors." *See Foremost Tehran, Inc. v. Iran*, 10 Iran-United States Trib.Rep. at 241-42, *reprinted in* App. 66. Because it was found that government controlled entities held a majority of the shares in Pak Dairy and that these entities also held a majority of the seats on the board of directors, the Claims Tribunal concluded that

Pak Dairy was a corporation controlled by the government of Iran.[14]

Thus, under the Algiers Accords, because of majority shareholding and majority control of the board of directors, Pak

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[14] *See Foremost Tehran, Inc. v. Iran*, 10 Iran-United States Claims Trib.Rep. at 242, *reprinted in* App. 67-68. A list of Pak Dairy's shareholders as of December 1979 and December 1980 indicated that Industrial and Mining Development Bank of Iran ("IMDBI," now the Industries and Mines Bank) held 3.6% of Pak Dairy's shares; National Iranian Banks Investment Company ("NIBIC") 10%; National Investment Company of Iran ("NICI") 8.3%; the Foundation for the Oppressed 9.5%; and the Financial Organization for the Expansion of Ownership of Industrial Units ("Financial Organization") 9.6% -- or 41.0% altogether. In addition, 11% of the shares were held by workers and farmers who had purchased shares from the Financial Organization, for which Financial Organization retained the voting rights. *See id.*, *reprinted in* App. 67. Before the Claims Tribunal, the parties agreed that the Financial Organization is an entity controlled by Iran. *See id.* at 241, *reprinted in* App. 65. The Financial Organization's charter was enacted by the Iranian Parliament and the Minister of the Ministry of Economic Affairs and Finance serves as Chair of its General Assembly. However, NICI and the Foundation for the Oppressed denied that they are controlled entities. *See id.* at 233, *reprinted in* App. 55. The Claims Tribunal, looking to the nationalized bank and nationalized insurance ownership of NICI, rejected the argument that NICI was not a government entity. *See id.* at 241, *reprinted in* App. 65-66. With regard to the Foundation for the Oppressed, the Claims Tribunal followed its previous determination in concluding that the Foundation is an instrumentality controlled by the government of Iran. *See id.* at 240, *reprinted in* App. 65. The Claims Tribunal also concluded that the IMDBI is under government control by virtue of the nationalization of all banks. *See id.* at 241, *reprinted in* App. 66. In turn, it concluded that NIBIC was under the ultimate control of the Iranian government because IMDBI was NIBIC's largest shareholder. *See id.* The Claims Tribunal further reasoned that even were this 52% majority not conclusive as to control, by sometime in 1980, six of the seven Board seats were government controlled. *See id.* at 242, *reprinted in* App. 67.

Dairy was seen as a government agency or instrumentality for which Iran had agreed to assume responsibility. We recognize that the same factors that influenced the Claims Tribunal to find liability under the Algiers Accords are relevant to determining whether an entity is an "agency or instrumentality" under section 1603(a) of FSIA. But these factors are *not* conclusive with respect to a claim of attribution under FSIA, *i.e.*, where a plaintiff seeks to overcome the presumption that a foreign state and agencies and instrumentalities thereof are separate juridical identities under FSIA. *See Hester, 879 F.2d at 177 n. 5.*

Majority shareholding and majority control of a board of directors, without more, are not sufficient to establish a relationship of principal to agent under FSIA. *See, e.g., Bancec, 462 U.S. at 614, 620-21, 623* (looking to principles of international law and federal common law to determine when instrumentalities should not be treated as distinct from the sovereign -- though the government owned all the stock and appointed delegates from governmental ministries to all the positions on the Governing Board); *Hester, 879 F.2d at 181.* ("The two factors of 100% ownership and appointment of the Board of Directors cannot by themselves force a court to disregard the separateness of the judicial entities."); *Hercaire Int'l, Inc. v. Argentina, 821 F.2d 559, 565 (11th Cir. 1987)* (concluding that 100% stock ownership alone is insufficient to overcome the presumption of separate juridical existence and that there was no showing that the foreign sovereign exercised "such extensive control ... as to warrant a finding of principal and agent," nor could the court "perceive any 'fraud or injustice' which results from insulating [the instrumentality's] property from attachment in aid of execution of the judgment against" the foreign state); *Baglab Ltd., 665 F. Supp. at 297* (instrumentality immune from suit where plaintiff failed to substantiate its contentions that the instrumentality either made the specific loan decision of a bank it acquired or exercised "general control over the day-to-day activities of [the codefendant bank] such that

[the codefendant bank] might be considered its agent"). The Claims Tribunal's findings simply do not answer the question with respect to attribution that is posed by this case.

Moreover, here, Iran's alleged control over Pak Dairy was exercised through entities on Pak Dairy's Board, which were in turn allegedly controlled by Iran. Thus, the alleged principal/agent relationship is not a direct one and, hence, the showing required to support a claim of attribution is far from straightforward. It cannot be presumed that the interests of a foreign state and its agencies or instrumentalities always are the same. Nor can it be assumed that an official from a state entity who serves on the board of directors of another such entity always will act to serve or promote the interests of the sovereign. Thus, the question concerning an alleged agent/principal relationship between the foreign state and an agency or instrumentality thereof does not involve a meaningless inquiry. The District Court will be required to address this issue on remand.

2. Conclusory Allegations

The District Court found "on the face of Foremost's complaint allegations which, although conclusory, would amount to the degree of control necessary to attribute the actions of the co-defendants to the Government of Iran." *Foremost III*, slip op. at 6 n. 8, *reprinted in* App. 8 n. 8. Where such conclusory allegations are challenged by the sovereign, the plaintiff must provide further proof of government involvement in order to overcome the presumption of juridical separateness. Determination of "who is and is not an agent of whom will be in great part factual," *Gilson, 682 F.2d at 1029,* and the fact-finding should be "explicit," *id.* at 1026. In the instant case, the fact-findings were not sufficiently explicit.

In *Gilson*, this court determined that dismissal of the action for lack of subject matter and personal jurisdiction was "premature in light of the dearth of fact-finding done by the district court thus far," *id.*, and the court remanded for further development of the facts. Here, we conclude that the District Court's denial of Iran's motion to dismiss was premature in light of the dearth of fact-finding and we remand for further development of the facts as to the relationship between Iran and Pak Dairy.

Where, as with foreign sovereigns, immunity involves protection from suit, not merely a defense to liability, more than the usual is required of trial courts in making pretrial factual and legal determinations. In such circumstances, it is particularly important that the court "satisfy itself of its authority to hear the case," *Prakash v. American University, 234 U.S. App. D.C. 75, 727 F.2d 1174, 1179 (D.C.Cir. 1984), before* trial. "Postponing the determination of subject matter jurisdiction until some point during or after trial" would "frustrate the significance and benefit of entitlement to immunity from suit." *Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1988).* Thus, "in many cases a resolution of the substantive immunity law issues will be required in order to reach a decision on subject matter jurisdiction. ... [A] court may have to interpret the substantive principles embodied in § § 1605-1607 before deciding whether to take jurisdiction." *Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 790-91 n.4 (2d Cir. 1980), cert. denied, 449 U.S. 1080, 66 L. Ed. 2d 804, 101 S. Ct. 863 (1981); see also First Fidelity Bank v. Government of Antigua & Barbuda, 877 F.2d 189, 195 (2d Cir. 1989)* (quoting same passage).

"Since entitlement of a party to immunity from suit is such a critical preliminary determination, the parties have the responsibility, and must be afforded a fair opportunity, to define issues of fact and law, and to submit evidence necessary to the

resolution of the issues." *Gould, 853 F.2d at 451.* Thus, to address a motion to dismiss under Rule 12(b)(1) where the suit involves a foreign sovereign and the court's jurisdiction over the sovereign is contested, the district court must do more than just look to the pleadings to ascertain whether to grant the motion to dismiss. The district court has "considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction." *Prakash, 727 F.2d at 1179.* Further fact-finding is clearly needed in the instant case; but in making the necessary preliminary determinations the District Court should closely control and limit the discovery and fact-finding so as to avoid "frustrating the significance and benefit of ... immunity from suit." *Gould, 853 F.2d at 451.*

E. *Application of the Section 1605(a)(2) "Commercial Activity" Exception*

Subject matter jurisdiction in a civil action against a foreign sovereign depends on whether one of the exceptions to immunity applies. *See 28 U.S.C. § 1330*(a). In the instant case, the District Court concluded that for jurisdictional purposes on the facts alleged by Foremost, Iran lacks sovereign immunity under the third clause of *28 U.S.C. § 1605*(a)(2). The third clause deprives a foreign sovereign of immunity for actions based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *28 U.S.C. § 1605*(a)(2). Iran contests both the classification of the acts as a "commercial activity" and the existence of any "direct effect."

1. Commercial Activity

Commercial activity is defined in FSIA as either a regular course of commercial conduct or a particular

commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. 28 U.S.C. § 1603(d). According to Iran, the complaint states a claim for expropriation -- a governmental act, not a commercial one -- and hence jurisdiction cannot obtain under the "commercial activity" exception of FSIA.

In rejecting Iran's argument, the District Court reasoned that there had been no formal declaration by the Government of Iran nationalizing Pak Dairy and that "the nature of the actions complained of by Foremost sound in the nature of a corporate dispute between majority and minority shareholders." *Foremost III*, slip op. at 9, *reprinted in* App. 11. According to the District Court, Foremost's "claim essentially involves allegations that Iran, acting through its various co-defendants on Pak Dairy's Board of Directors, used its majority position to lock Foremost out of the management of the company and deny Foremost its share of the company's earnings in the form of dividends." *Id.* at

It seems plain that Foremost's complaint alleges actions that are both commercial and governmental in nature. It is also clear that in determining its jurisdiction the District Court may consider only those actions that are commercial in nature. *Millen Indus., Inc. v. Coordination Council for No. Am. Affairs, 272 U.S. App. D.C. 240, 855 F.2d 879, 885 (D.C.Cir. 1988)* (when a "transaction partakes of both commercial and sovereign elements," "jurisdiction will not obtain if the cause of action is based on a sovereign activity"). But "one allegation of the complaint ... may be sufficient to create jurisdiction." *Id.* Here, some of the alleged acts that provide the basis for Foremost's cause of action are commercial in nature, as even Iran admits. *See* Brief for Appellant at 26-27. Moreover, Iran has offered no countervailing evidence indicating that these

alleged commercial acts were subsumed within a sovereign activity.

There is no indication that Iran nationalized Pak Dairy by taking it over through a process of law. Indeed, in its amended answer to the complaint, "Iran denies Pak Dairy is controlled by Iran or that it is an agency or instrumentality of Iran, as defined in *28 U.S.C. § 1603*(b)." Amended Answer of Defendant Islamic Republic of Iran para. 11, *reprinted in* App. 124. Nor have the parties pointed to any statutory restrictions or governmental decrees or directives depriving persons outside Iran of the right to sell or transfer shares in an Iranian enterprise or of a government policy curtailing the payment of dividends. The Claims Tribunal determined that Foremost had "not proved the existence of any statutory restriction on its right to sell or otherwise dispose of its shares." *Foremost-Tehran, Inc. v. Iran*, 10 Iran-United States Claims Trib. Rep. at 250, *reprinted in* App. 78. In the absence of such countervailing evidence, the District Court properly concluded that the actions alleged were sufficiently commercial in nature to withstand Iran's motion to dismiss.[15]

2. Direct Effects

In further defense against the appellee's claim under section 1605(a)(2), Iran contends that none of the alleged acts of the sovereign had a "direct effect" in the United States. Without reaching the merits of the issue, we find no error in the

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[15] Iran also argues that "the *only* provision in the FSIA which denies to foreign states immunity from suit for the taking of property" is *28 U.S.C. § 1605*(a)(3). Brief for Appellant at 28-29 (emphasis added). This claim finds no support in the case law, and Iran cites none. It is clear that if a proper showing is made, the appellee can rely on the "commercial activity" exception, under section 1605(a)(2), to pursue a claim against Iran.

District Court's determination that the facts alleged by Foremost exhibit sufficiently direct effects to confer subject matter jurisdiction under the third clause of section 1605(a)(2).

In support of its position, Iran cites *Zedan v. Kingdom of Saudi Arabia, 270 U.S. App. D.C. 382, 849 F.2d 1511 (D.C.Cir. 1988)*, in which the court held that a "direct effect" for purposes of the commercial activity exception to immunity "is one that is substantial and foreseeable," *id.* at 1514. Iran's reliance on *Zedan* is futile. In *Zedan*, this court concluded that the suffering of financial hardship in the United States from events that take place abroad is not, alone, sufficient to establish "direct effects." *See id.* at 1514, 1515. While in Saudi Arabia, Zedan -- an American citizen -- contracted to work for an agency of the government. He had not received the payment due under the contract at the time he returned to the United States. Zedan claimed that he suffered financial loss when the defendant-foreign sovereign failed to forward to the United States money owed him. *Id.* at 1512. The court concluded that the effects were not foreseeable. *Id.* at 1515.

Here, the effects alleged were foreseeable, substantial and direct. As to foreseeability, according to Foremost, there was a constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran to support the operation of Pak Dairy. *See* Complaint at para. 17, *reprinted in* App. 28. Foremost owned shares and had representation on the Board. It is hardly convincing that, with the close commercial ties alleged here, it would be "unforeseeable" that actions taken by the Government of Iran within its borders would have effects in the United States. In *Maritime Int'l Nominees Establishment v. Republic of Guinea, 224 U.S. App. D.C. 119, 693 F.2d 1094, 1111 (D.C.Cir. 1982), cert. denied, 464 U.S. 815, 78 L. Ed. 2d 84, 104 S. Ct. 71 (1983)*, this court concluded that the financial effects on the United States company were fortuitous, since it

was not contemplated in the original agreement that the United States company would share in the profits. By contrast, where a Mexican bank, the foreign instrumentality, had "engaged in a regular course of business conduct with [the American purchaser of certificates of deposit] over a several-year period," the Fifth Circuit found "direct effects." *Callejo v. Bancomer, S.A., 764 F.2d 1101, 1112 (5th Cir. 1985).* In the instant case. Foremost alleges that the involvement of Foremost *was* contemplated in the original agreement and extended over a period of years.

Nor does case law support the conclusion that the effects alleged are *insubstantial* or not "direct." The alleged effects of freezing-out American corporations in their ownership of Pak Dairy are at least as substantial and direct as effects alleged in prior cases in which this court and other circuits have found "direct effects." For example, the *Callejo* court determined that a foreign instrumentality-bank's breach of contract regarding payment of principal and interest on certificates of deposits had "direct effects" on their United States-resident owner within the meaning of FSIA. *Callejo, 764 F.2d at 1110-12.* In *Texas Trading & Milling Corp v. Federal Republic of Nigeria, 647 F.2d 300, 312-13 (2d Cir. 1981), cert. denied, 454 U.S. 1148, 71 L. Ed. 2d 301, 102 S. Ct. 1012 (1982),* the Second Circuit determined that, under either a breach of contract or breach of letters of credit theory, Nigeria's unilateral alteration of the letters of credit and cancellation of contracts had direct effects on the United States companies that were suppliers under the contracts. And in *Transamerican S.S., 767 F.2d at 1004,* this court determined that the effects of the foreign agency's detention of an American ship, which caused the American corporation to incur debt, and the agency's demand for payment in the United States "were both direct and substantial within the meaning of the FSIA." Adhering to this line of precedent, we find no infirmity with the District Court's determination that the alleged effects were

sufficiently direct to survive Iran's motion to dismiss.

F. *Treaty of Amity*

Foremost claims that, under the Treaty of Amity, Iran waived its sovereign immunity as to suits arising out of commercial activity in which it is involved. Thus, according to Foremost, there is no jurisdictional issue to be addressed under FSIA. We cannot agree.

Two sections of the Foreign Sovereign Immunities Act bear on consideration of the effect of the Treaty of Amity: sections 1604 and 1605(a)(1). Section 1604 of FSIA provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604. "This exception [to FSIA] applies when international agreements 'expressly conflict' with the immunity provisions of the FSIA." *Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 109 S. Ct. 683, 692, 102 L. Ed. 2d 818 (1989).* The Supreme Court found no such *express conflict* where the international conventions "set forth substantive rules of conduct" and did "not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Id.* Article IV of the Treaty of Amity sets forth such substantive provisions, and hence does not pose a bar to application of FSIA.[16]

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[16]Article IV of the Treaty of Amity provides, in relevant part:

In addition, pursuant to section 1605(a)(1), if the Treaty of Amity contained an *explicit waiver* of sovereign immunity, the foreign state would not be entitled to immunity under FSIA.

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1. Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.

2. Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

....

4. Enterprises which nationals and companies of either High Contracting Party are permitted to establish or acquire, within the territories of the other High Contracting Party, shall be permitted freely to conduct their activities therein, upon terms no less favorable than other enterprises of whatever nationality engaged in similar activities. Such nationals and companies shall enjoy the right to continued control and management of such enterprises; to engage attorneys, agents, accountants and other technical experts, executive personnel, interpreters and other specialized employees of their choice; and to do all other things necessary or incidental to the effective conduct of their affairs.

Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, *8 U.S.T. 899, 903-04*, art. IV (1957).

See Amerada Hess, 109 S. Ct. at 692; Berkovitz v. Islamic Republic of Iran, 735 F.2d 329, 333 (9th Cir.), *cert. denied, 469 U.S. 1035, 83 L. Ed. 2d 401, 105 S. Ct. 510 (1984).* However, the only express provision for waiver of sovereign immunity under the Treaty of Amity is found in Article XI, paragraph 4:

> No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from ... suit. ...

8 U.S.T. at 908. We agree with the Ninth Circuit that this "limited waiver" "extends only to enterprises of Iran, not Iran itself" and "extends only to enterprises 'doing business' in the United States." *Berkovitz, 735 F.2d at 333; see also Jafari v. Islamic Republic of Iran, 539 F. Supp. 209, 211 (N.D. Ill. 1982)* (concluding that art. XI para. 4 of the Treaty of Amity waives immunity of enterprises but not of Iran itself); *Mashayekhi v. Iran, 515 F. Supp. 41, 43 (D.D.C. 1981)* (finding limited waiver of immunity in Article XI); *cf. Gibbons v. Republic of Ireland, 532 F. Supp. 668, 672 (D.D.C. 1982)* (concluding that virtually identical treaty provision waived immunity of "enterprises" including the sovereign's instrumentalities but did not waive immunity of the sovereign itself). In the instant case, the alleged commercial actions took place in Iran not in the United States and Foremost brought the action against the sovereign itself. Thus, the provisions of Article XI, paragraph 4, are not apposite and, for the purposes of the instant case, Iran did not waive its immunity in that

treaty.[17]

G. *In Personam Jurisdiction*

In its brief to this court, Iran claims that it lacks the constitutionally mandated minimum contacts with the forum for the District Court to exercise *in personam* jurisdiction. Foremost contends that Iran has waived any claim on this matter because the issue was never raised below. We agree.

In the proceedings before the District Court, Iran's only defense resting on personal jurisdiction involved a *statutory* claim. Iran's memorandum in support of its motion to dismiss contained but one sentence regarding personal jurisdiction: "Because under the FSIA personal jurisdiction cannot exist unless there is subject-matter jurisdiction, *28 U.S.C. § 1330*(b), the Court also lacks personal jurisdiction." Memorandum of Points and Authorities in Support of Motion to Dismiss and in Opposition to Motion for Partial Summary Judgment at 11 (Sept. 7, 1988). Iran mentioned an absence of "minimum contacts" only in the context of its claim that its actions in Iran had no direct effects in the United States. *See id.* at 7.

Iran may not now raise the separate constitutional ground for a claim of lack of *in personam* jurisdiction. Claims regarding defects in personal jurisdiction are waived if not raised. *See* FED.R.CIV.P. 12(g), (h); *see also Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703-07, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982)* (noting that a constitutional *in personam* jurisdiction claim is waived if not timely raised); *cf. Anger v. Revco Drug Co., 253*

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[17] We do not decide here in what contexts, if any, the Treaty of Amity might constitute a waiver of immunity. We conclude only that the treaty has not effected a waiver in the instant case.

U.S. App. D.C. 54, 791 F.2d 956, 958 (D.C.Cir. 1986) (*per curiam*) (concluding that "the Federal Rules of Civil Procedure indicate that personal jurisdiction is a matter to be raised by motion or responsive pleading, not by the court *sua sponte*," and explaining that lack of personal jurisdiction is a threshold defense open to a party, "but subject to foreclosure absent timely objection"). It is also well settled that a party may not raise a new legal theory on appeal for the first time. *See, e.g., District of Columbia v. Air Florida, Inc., 243 U.S. App. D.C. 1, 750 F.2d 1077, 1084 (D.C.Cir. 1984).* Thus, we deny Iran's request for reversal or remand on this issue.

III. CONCLUSION

The findings of the Claims Tribunal, without more, are not sufficient to overcome the presumption of the independent status of foreign agencies, instrumentalities and states. In making the threshold jurisdictional determination, the District Court must consider whether the relationship between Pak Dairy and Iran is one of a principal to an agent. Thus, we remand to the District Court for more extensive findings on the degree of control exerted by Iran over Pak Dairy and over the shareholder entities that Foremost alleges are government controlled. For the reasons set forth in this opinion, we affirm the District Court's determinations with respect to all the other issues raised in this appeal.

It is so ordered.

APPENDIX I

MCKESSON CORPORATION; FOREMOST TEHRAN, INC.; FOREMOST SHIR, INC.; FOREMOST IRAN CORPORATION; OVERSEAS PRIVATE INVESTMENT CORPORATION,

APPELLEES

CROSS-APPELLANTS

v.

ISLAMIC REPUBLIC OF IRAN,

APPELLANT

CROSS-APPELLEE

Nos. 93-7167, 93-7168

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

311 U.S. App. D.C. 197; 52 F.3d 346

January 27, 1995, Argued
April 14, 1995, Decided

PRIOR HISTORY:

Appeal from the United States District Court for the District of Columbia Circuit (82cv00220)

COUNSEL:

Thomas G. Corcoran, Jr. argued the cause for appellant/cross-appellee. With him on the briefs was Henry M. Lloyd.

Mark R. Joelson and Mark N. Bravin argued the cause and filed the briefs for appellees/cross-appellants. Joseph P. Griffin entered an appearance.

JUDGES:

Before: HENDERSON, RANDOLPH, and ROGERS, Circuit Judges. Opinion for the court filed by Circuit Judge RANDOLPH.

OPINION BY:

RANDOLPH

OPINION:

RANDOLPH, *Circuit Judge:*

These are interlocutory cross-appeals from the judgments of the district court rendered on remand from our decision in *Foremost-McKesson, Inc. v. Islamic Republic of Iran, 284 U.S. App. D.C. 333, 905 F.2d 438 (D.C. Cir. 1990).* Iran's appeal presents two issues regarding its immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified in part at *28 U.S.C. § § 1330,* 1391(f), 1602-1611). The first is whether, as the district court ruled on remand and as we determined in Iran's

1990 interlocutory appeal, the complaint alleges a sufficient "direct effect in the United States" to deprive Iran of immunity under FSIA § 1605(a)(2). We hold that the law of the case applies and therefore refuse to reconsider our earlier decision. Iran's second issue is whether, as the district court found, the evidence establishes a principal-agent relationship between Iran and its codefendants with respect to the alleged interference with and taking of McKesson's shareholder rights in a dairy company in Iran. On this subject, we sustain the district court's finding. McKesson and the Overseas Private Investment Corporation (OPIC) appeal from the district court's judgment refusing to impose certain sanctions on Iran for its failure to comply with discovery requests. Because the court's judgment is not a final order, it is not subject to interlocutory review. We therefore dismiss McKesson's and OPIC's appeal for lack of appellate jurisdiction.

I

A

McKesson Corporation is a Maryland corporation with its principal place of business in California. In 1959, at the request of a group of Iranian citizens, McKesson agreed to assist in establishing a dairy, the Sherkat Sahami Labaniat Pasteurize Pak ("Pak Dairy") in Iran. McKesson's amended complaint alleges that it agreed to furnish "one-half of the required capital, and all the necessary management skills and personnel, engineering data, sources of material, procurement services, ingredients, and packaging. Through separate agreements, McKesson agreed to provide technical assistance as needed, and licensed its trademarks in exchange for receipt of royalties." Between 1959 and 1979, McKesson provided the top management for the dairy, and controlled its board of directors. In 1979, McKesson--or Foremost-McKesson, Inc., as the company was then called--held 31 percent of the equity

interest in Pak Dairy.

The following text and footnotes 1-6 describing what then transpired are taken from our earlier opinion. "On January 22, 1982, [McKesson] and the Overseas Private Investment Corporation [1] filed a complaint in the District Court against Iran and several agencies and instrumentalities of Iran through which [McKesson] claims Iran acted. These agencies and instrumentalities included the Financial Organization for the Expansion of Ownership of Productive Units, the National Investment Company of Iran, [Bank of Industry and Mine], the Foundation for the Oppressed and Pak Dairy. The complaint alleged that Iran, acting through the codefendant agencies and instrumentalities, illegally divested [McKesson] of its investment in Pak Dairy. [McKesson] and OPIC sought compensation for the entire value of their jointly held 19.84% insured equity interest in Pak Dairy,[2] allegedly valued at not less than $7,040,000, plus interest; compensation for their share in any dividends declared and not received before the alleged divestment of their equity interest; and various other damages, including attorneys' fees. *See* Complaint WW 38-39, *reprinted in* Appendix ("App.") 36.

"On June 29, 1982, Iran responded to the complaint in what it titled an "Answer to Complaint.' *See* Answer to Complaint [hereinafter 1982 Answer], *reprinted in* App. 46. In this response, Iran did not state the defenses raised in its motion to dismiss and did not admit or deny [McKesson]'s averments. *cf.* Fed. R. Civ. P. 8(b); rather, Iran contended that prosecution

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[1] OPIC is an agency of the United States that insures private overseas investments of United States nationals.

[2] [McKesson] sought damages only for the insured portion of its shareholding: 64% of its 31% ownership or 19.84% of the total shares.

of the suit was barred by the so-called Algiers Accords of January 19, 1981, [3] and that, pursuant to Executive Order No. 12,294, *46 Fed. Reg. 14,111 (1981)* ("Executive Order"), the "complaint had no legal effect other than to toll the applicable statute of limitations.' 1982 Answer at 1, *reprinted in* App. 46.[4] Pursuant to the terms of the Executive Order, the District Court took no action in this case while [McKesson] and OPIC presented their claims against Iran to the Iran-United States Claims Tribunal ("Claims Tribunal") in The Hague.

"On April 10, 1986, the Claims Tribunal concluded that interference with [McKesson]'s rights had not, by January 19, 1981, amounted to an expropriation. *See Foremost Tehran, Inc. v. Islamic Republic of Iran,* 10 Iran-United States Claims Trib. Rep. 228, 250, *reprinted in* App. 78. [5] However, the Claims

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[3] Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 Int'l L. Materials 224 (1981) [hereinafter Algiers Accords].

[4] The Executive Order provided that plaintiffs with claims arguably within the jurisdiction of the Claims Tribunal could file suit in federal court in order to toll the period of limitations for commencing the action. *See 46 Fed. Reg.* at 14, 111. The Executive Order "purports only to "suspend' the claims, not divest the federal court of "jurisdiction.' " *Dames & Moore v. Regan, 453 U.S. 654, 684, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981).*

[5] A claim must have been "outstanding" on January 19, 1981, to fall within the jurisdiction of the Claims Tribunal. *See* Algiers Accords, *supra* note 3, at art. II, P 1; *see also Foremost Tehran, Inc. v. Iran,* 10 Iran-United States Trib. Rep. at 233 n.5, *reprinted in* App. 54 n.2. The parties apparently dispute whether the Claims Tribunal's determination in favor of Iran on the expropriation claim was based on the merits or on lack of jurisdiction. However, that issue is not before us in this appeal, and accordingly, we do not address that issue.

Tribunal concluded that Pak Dairy had unlawfully withheld from [McKesson] cash dividends declared in 1979 and 1980, and it therefore awarded [McKesson] approximately $ 900,000, plus interest, against Iran. The Claims Tribunal also concluded that Pak Dairy unlawfully failed to deliver to [McKesson] stock certificates representing stock dividends declared in 1980 and that Pak Dairy had breached contractual obligations in failing to pay rental payments due and to return upon demand certain machines to [McKesson]. The Claims Tribunal awarded [McKesson] in excess of $ 500,000 in damages against Pak Dairy for the contract breaches. *See id.* at 257-58, *reprinted in* App. 88. Iran paid the amounts awarded out of the security account established at The Hague pursuant to the provisions of the Algiers Accords.

"On April 1, 1988, the plaintiffs--still seeking damages for claimed losses--revived this lawsuit by filing a motion for partial summary judgment against Iran on the issue of liability. The plaintiffs alleged facts that arguably support a conclusion that the dairy was expropriated *after* the 1981 limit to the Claims Tribunal's jurisdiction. *See Foremost- McKesson, Inc. v. Islamic Republic of Iran, 1989 U.S. Dist. LEXIS 4055,* *3, Civ. Action No. 82-0220 (D.D.C. Apr. 18, 1989) ("*Foremost III*"), *reprinted in* App. 4.[6]

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"Concurrently, Iran filed a motion to dismiss the underlying complaint, pursuant to Rule 12(b)(1) and (2) of the Federal Rules of Civil Procedure, for lack of jurisdiction under

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[6] The Supreme Court explained in *Dames & Moore, 453 U.S. at 684-85,* that, "as we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will 'revive' and become judicially enforceable in United States courts."

FSIA. The District Court denied Iran's motion to dismiss. *See Foremost III*, Civ. Action No. 82-0220 (D.D.C. Apr. 18, 1989), *reprinted in* App. 3. Iran then filed this interlocutory appeal." *Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d at 441-42.*

B

A foreign state is "immune from the jurisdiction of the courts of the United States and of the States" unless the foreign state's conduct falls within one of FSIA's exceptions. *28 U.S.C. § § 1604,* 1605-07; *Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989).* In our earlier ruling, we affirmed the district court's judgment that "the facts alleged by [McKesson] exhibit sufficiently direct effects to confer subject matter jurisdiction under the third clause of section 1605(a)(2)." *905 F.2d at 450.*[7] McKesson had invoked the "commercial activity" exception contained in the third clause of § 1605(a)(2), which reads:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--
>
> ***
>
> (2) in which the action is based ... upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

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[7] We also held that McKesson had satisfied the portion of § 1605(a)(2) requiring that its suit be based upon "an act" in Iran "in connection with a commercial activity" of *Iran. 905 F.2d at 449-50.* This holding is not involved in the present appeal.

After we remanded the case, the Supreme Court issued *Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992),* interpreting § 1605(a)(2)'s commercial activity exception. Claiming that *Weltover* had undermined our ruling, Iran once again moved to dismiss the suit. The district court responded thus: "As McKesson suggests and the Court of Appeals has affirmed, the [district] Court's finding of a direct effect in the United States is fully supported by the evidence, regardless of any changes engendered by *Weltover*."

In our earlier decision, we also determined that the district court, in making its initial jurisdictional determination, had to make factual findings regarding the "degree of control exerted by Iran over Pak Dairy and over the shareholder entities that [McKesson] alleges are government controlled." *905 F.2d at 453.* Unless "the relationship between Pak Dairy and Iran is one of principal to an agent," the actions of the codefendant entities could not be attributed to Iran, and § 1605(a)(2) would not deprive Iran of immunity from suit.

On remand from our earlier decision, the district court denied McKesson's motion to sanction Iran for failing to provide discovery. Although Iran's responses to the interrogatories and document requests "skirted close to the edge," Iran had not violated the court's discovery order or the Federal Rules of Civil Procedure. The district court therefore never passed on McKesson's claim that an appropriate sanction would be a finding of subject matter jurisdiction.

II

In order for us to rule for the second time on Iran's contentions regarding the direct effects portion of § 1605(a)(2), we would have to find some reason for not adhering to the law of the case doctrine. "When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case

doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 1995 U.S. App. LEXIS 4236,* *7 (D.C. Cir. 1995). One common reason for lifting this constraint is an intervening Supreme Court decision changing the law. *NTEU v. FLRA, 30 F.3d 1510, 1516 (D.C. Cir. 1994).* Iran supposes that *Weltover* fits that mold.

Before *Weltover,* several courts, including this one, subscribed to the view that under § 1605(a)(2), direct effects must also be "substantial" and "foreseeable." The quoted terms appeared, not in the statute, but in a House Report on the bill that became the FSIA. Agreeing with a line of Second Circuit decisions, including *Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 311 (2d Cir. 1981), cert. denied, 454 U.S. 1148, 71 L. Ed. 2d 301, 102 S. Ct. 1012 (1982),* the Supreme Court in *Weltover* rejected "the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability.' " *112 S. Ct. at 2168.* Even insubstantial effects qualify under § 1605(a)(2) so long as they are not "purely trivial." *Id.* Whether effects were foreseeable is beside the point. It is enough, the Court held, that the consequences of the defendant's activities followed immediately from those activities. *Id.* The effects then are "direct." The Court also decided that the effects in *Weltover* were "in the United States," as § 1605(a)(2) also required. Plaintiffs had satisfied this aspect of § 1605(a)(2) although they were foreign corporations holding Argentine bonds: the bonds were payable in the United States and Argentina's failure to honor this contractual commitment "necessarily had a 'direct effect' in the United States." *Id.*

There is no doubt that, as far as this circuit is concerned, Weltover changed the law. The question remains whether *Weltover* did so in a way that was material to the outcome of

our previous ruling in this case. The significance of *Weltover* stemmed not from the Supreme Court's unremarkable equation of "direct" and "immediate," but from the Court's rejection of the additional requirements of foreseeability and substantiality this court and others, not including the Second Circuit, had engrafted on § 1605(a)(2)'s commercial activity exception. If our earlier decision in this case had been that the effects McKesson alleged were "direct" *because* they were foreseeable and substantial, *Weltover* would warrant reconsideration of our ruling. But that is not what we held in the first appeal. Our decision was that the following effects of Iran's alleged actions were "foreseeable, substantial *and* direct." *905 F.2d at 451* (italics added): the "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran to support the operation of Pak Dairy" came to a halt; and McKesson's role as an active investor ceased when the dairy's new directors, illegally installed according to McKesson, cut off all of the dairy's existing "commercial ties" with McKesson in the United States. *Id.*[8] *Weltover* rendered superfluous our discussion of why these effects were "foreseeable" and "substantial." But *Weltover* did not undermine our separate determination that these alleged effects were also "direct." In reaching that conclusion we relied on, and said we were "adhering" to, the Second Circuit's decision in *Texas Trading*, the same case the Supreme Court cited with approval in *Weltover*. 905 F.2d at

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[8] These were the "effects" the court determined were foreseeable, substantial and direct. McKesson's theory was not that Iran's calling a halt to the flow of capital, equipment and personnel breached any legal obligations, but that the stoppage was a direct consequence of Iran's interference with McKesson's "rights to participate in the management of Pak Dairy" (*see, e.g.*, Amended Complaint WW 24, 26-30, 33-36).

451.[9] Nothing in our prior opinion indicates that we believed "direct" meant anything other than immediate. In addition to *Texas Trading*, we relied upon *Zedan v. Kingdom of Saudi Arabia, 270 U.S. App. D.C. 382, 849 F.2d 1511, 1515 (D.C. Cir. 1988)*, which held that the effect in the United States of a breach of contract abroad could not be "direct" under § 1605(a)(2) if the "effect is due to an intervening event." As the Tenth Circuit has recognized, *Zedan* is consistent with *Weltover. United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n, 33 F.3d 1232, 1239 & n.6 (10th Cir. 1994).*

While *Weltover* changed the law by removing foreseeability and substantiality from consideration, it did not undercut the remaining reason we gave for applying the commercial activity exception of § 1605(a)(2)--that the effects were "direct." Because this portion of our prior opinion is unaffected by *Weltover*, it remains the law of the case, not subject to reconsideration in this second interlocutory appeal. What we wrote five years ago bears repeating: "We are not making a final determination whether jurisdiction exists under FSIA; nor are we making any final factual determinations. Rather we are addressing whether the District Court properly denied Iran's motion to dismiss." *905 F.2d at 440 n.3.* As before, we "find no infirmity with the District Court's determination that the alleged effects were sufficiently direct to survive Iran's motion to dismiss." *Id.* at 451.

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[9] Relying on *Goodman Holdings v. Rafidain Bank, 307 U.S. App. D.C. 79, 26 F.3d 1143, 1146-47 (D.C. Cir. 1994)*, Iran claims that Pak Dairy's cash dividends were payable in Iran, not in the United States, and for that reason McKesson's failure to receive these dividends cannot be considered a § 1605(a)(2) "direct effect in the United States." But our earlier decision is controlling and it did not mention, as a direct effect, Pak Dairy's failure to pay cash dividends to McKesson. *See 905 F.2d at 450-51.*

III

In the previous section we assumed that the alleged actions having a direct effect in the United States were attributable to Iran. Whether that assumption is correct is the second issue posed in Iran's appeal. We said in our earlier ruling that in order to deprive Iran of immunity, the district court had to find that Iran exercised "sufficient control ... over Pak Dairy to create a relationship of principal to agent." *905 F.2d at 447.* While the FSIA applies both to instrumentalities and agencies of the foreign sovereign, and to the sovereign itself, there is a presumption that such entities and the sovereign are independent. *Id.* at 446, citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 626-27, 77 L. Ed. 2d 46, 103 S. Ct. 2591 (1983)* ("*Bancec*"). "Iran's alleged control over Pak Dairy was exercised through entities on Pak Dairy's Board, which were in turn controlled by Iran. Thus, the alleged principal/agent relationship is not a direct one and, hence, the showing required to support a claim of attribution is far from straightforward." *905 F.2d at 448.*

It would serve no useful purpose to recite in detail the extensive findings the district court issued on remand. We have reviewed those findings and have determined that they are well-supported. The Financial Organization for the Expansion of Ownership of Productive Units, the National Investment Company of Iran, the Bank of Industry and Mine, and the Foundation for the Oppressed were, the court found, organizations of the Iranian government. Together these government entities held 52 percent of Pak Dairy's stock and controlled six of the seven seats on its board of directors. Pak Dairy's board and its government shareholders forced the dairy to disregard its commercial mission and its duties to McKesson as a shareholder. In the words of the Financial Organization's Managing Director, who dominated and eventually chaired the

board, Pak Dairy was no longer "a joint stock company" whose primary fiduciary duty was to its stockholders. Rather, "the profit of the people and the Government should also be considered" and "the main objective is ... to protect the interests of the country...." Iran's interest became the decisive factor in Pak Dairy's actions with regard to McKesson. Routine business decisions, such as declaring and paying dividends to shareholders and honoring the dairy's contractual commitments, were dictated by Iran through the Financial Organization and the other government representatives on Pak Dairy's board. In regard to Pak Dairy's denying dividends to McKesson, Iran's role was direct and manifest. The board deferred its decision to withhold dividends from McKesson so that "the representatives of the government firms would get in touch with their heads to find a probable solution to the problem." Hence Iran's Cabinet Ministers (and officials answerable to them) became involved in this decision-making process, as reflected by Pak Dairy's corporate records.

From this and other evidence, the district court properly found that:

> Upon recommendations by the board, the shareholders, a majority of which were government-owned, determined when to pay cash and stock dividends. The board decided that Pak Dairy would not pay any money to foreign shareholders, including McKesson. This extensive involvement in the day-to-day operations of Pak Dairy is evidence of a principal/agent relationship between Iran and Pak Dairy.

Iran argues that "*the principal* ... must manifest in some manner that the agent is its agent." Brief for Appellant at 30. Here, as the district court found, Iran did manifest its agency

relationship with the co-defendants. That relationship was manifested generally through Iran's control over the management of the co-defendants and through a pattern of conduct and policy statements that caused "the agents to believe that the principal desired [them] so to act on the principal's account." RESTATEMENT (SECOND) OF AGENCY § 26 (1957). That conduct, as the district court described it, included rampant anti-American propaganda, expulsions of Americans and takings of American interests, which caused the government representatives on Pak Dairy's board to believe that Iran desired them to take these steps with regard to McKesson. And Iran's manifestation of assent to the denial of dividends to McKesson came from the highest levels of the Iranian government when the Pak Dairy board members sought approval from their agency heads before acting.

There is, in short, more than enough evidence to support the district court's finding that Iran had sufficient control over Pak Dairy to create a principal/agent relationship. We also conclude that the district court applied the correct legal standard in evaluating that evidence. The Supreme Court's *Bancec* decision, on which our earlier opinion relied, invokes attribution principles common to both international law and federal common law. *462 U.S. at 621-23.* We have already mentioned the Restatement of Agency. In the international context, jurists and scholars recognize that when a state-controlled corporation implements state policies, its separate corporate existence does not shield the state from liability. *See, e.g., Case Concerning the Barcelona Traction, Light & Power Co. (Belg. v. Spain),* 1970 I.C.J. 4, 38-39 (February 5); Roberto Ago, *Third Report on State Responsibility,* [1971] 2 Y.B. INT'L L. COMM'N 199, 256, UN Doc. A/CN.4/246 and Add.1-3 (1971) (when the occasion arises, "the conduct of officials of [state] corporations or institutions must be regarded, at the international level, as "acts of the State.' "); Aris Haigian,

Note, *The Separate Entity Fiction Exposed: Disregarding Self-Serving Recitals of Juridical Autonomy in Nationalization Cases*, 6 FORDHAM INT'L L.J. 288, 303 (1982-83). Still, Iran may be correct that if a government corporation is simply carrying out a state commercial policy as a normal part of the corporation's mission, without any state involvement, the state should be insulated from the corporation's actions. Many of the cases Iran cites fall into this category. This case is far different. Here the governmental policy was not commercial. It was instead designed to injure some of the corporation's own shareholders and to do so through a corporate policy guided by government representatives.

The district court offered other grounds for finding that the requisite principal-agency relationship existed and for attributing Pak Dairy's actions to Iran, but we need not pass upon those portions of its comprehensive decision. What we have already recited is sufficient to support the court's ruling on remand that the FSIA does not immunize Iran from a trial in this case.

IV

This brings us to McKesson's cross-appeal from the district court's order rejecting McKesson's motion for sanctions against Iran pursuant to Fed. R. Civ. P. 37(b)(2)(A). Although Iran had not been cooperative in responding to McKesson's interrogatories and document requests, the court did not believe Iran had violated its discovery order or the Federal Rules of Civil Procedure. Having found no violations, the court did not reach the question what sanctions would be appropriate.[10]

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[10] McKesson suggested that the court sanction Iran by finding that the "Government of Iran exercised the necessary degree of control over the other defendants to create a principal/agent relationship with respect to the matters alleged in the Amended Complaint."

Orders refusing to find discovery violations, like other discovery orders, are interlocutory. They do not finally end the litigation. They are generally reviewable after final decision. If the final decision is favorable to the movant, they may never become the subject of an appeal. For these reasons and others, discovery orders are not usually appealable until the litigation has finally ended. *See, e.g., Reise v. Board of Regents, 957 F.2d 293, 295 (7th Cir. 1992); Uehlein v. Jackson Nat'l Life Ins. Co., 794 F.2d 300, 302 (7th Cir. 1986); Atlantic Richfield Co. v. United States Dep't of Energy, 248 U.S. App. D.C. 82, 769 F.2d 771, 780 n.62 (D.C. Cir. 1984).*

The parties argue about the merits of the court's discovery order without pausing to tell us why we have appellate jurisdiction over it. They must be assuming that our jurisdiction over Iran's interlocutory appeal from the court's denial of its motion to dismiss gives us jurisdiction over McKesson's cross-appeal. This does not follow. The district court's order denying Iran's motion to dismiss falls within the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949),* because Iran's sovereign immunity is an immunity from trial. *905 F.2d at 443.* The discovery order does not qualify for such treatment. It is not independently appealable. A "rule loosely allowing pendent appellate jurisdiction," the Supreme Court warned, "would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets," *Swint v. Chambers County Comm'n, 131 L. Ed. 2d 60, 115 S. Ct. 1203, 1211 (1995).* As in *Swint,* the district court's discovery order is not "inextricably intertwined" with the court's denial of Iran's motion to dismiss. *115 S. Ct. at 1212.* The district court found that the case fell within § 1605(a)(2) without considering whether Iran had breached its discovery obligations. We have affirmed that interlocutory ruling. The sanction McKesson sought is therefore beside the point at this

preliminary stage of the litigation. If the district court ultimately rules against McKesson on the jurisdictional issues, or if McKesson loses on the merits, it can raise the discovery issues in an appeal from the final judgment. We therefore hold that we do not have pendent appellate jurisdiction over the discovery order.

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The judgment of the district court denying Iran's motion to dismiss is affirmed. McKesson's cross-appeal is dismissed for lack of appellate jurisdiction.

So ordered.